CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

LEGAL UPDATE 2011

TRAINING VIDEO REFERENCE GUIDE

THE MISSION OF THE CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING IS TO CONTINUALLY ENHANCE THE PROFESSIONALISM OF CALIFORNIA LAW ENFORCEMENT IN SERVING ITS COMMUNITIES

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INTRODUCTION

Each year, California peace officers are accountable for enforcing dozens of new laws enacted by the state legislature, and every month, officers are expected to abide by new case decisions from the courts.

This annual training video program provides a comprehensive overview of new legislation and case law decisions impacting California law enforcement in 2011. The program presents all new general, traffic, and case decisions that will have the most significant impact on the peace officers' role in California.

The first part of the program features legislative updates, while the second part of the program presents case law review and updates in laws related to substantive, interrogation, and search and seizure laws.

This training video reference guide is designed to be used in conjunction with the video-based training course that is available exclusively online via the POST Learning Portal at: www.lp.post.ca.gov. Print materials are arranged to follow along with the video program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

Questions regarding this program should be directed to Jan Bullard, Learning Technology Resources Bureau at the Commission on POST, (916) 227-4829 or janice.bullard@post.ca.gov

LEGAL UPDATE 2011

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

ALCOHOLIC BEVERAGES: INSTRUCTIONAL TASTING

Business and Professions Code Sections 23396.6 (Added) and 25503.56 (Added) Chapter 230 / Assembly Bill 605

SUMMARY: This law allows off-sale retail licensees to host the companies that produce or import beer, wine or distilled spirits for an "instructional tasting event". The over 21 tasters are limited to 3 tastes per day. Beer is limited to a total of 8 ounces. Distilled spirits tastes are ¼ ounce each and wine is 1 ounce each. The area has to be divided or roped off to underage customers. The event has to be done between 1000 and 2100 hours. There can only be one company participating at a time in the off-sale location. If the location is a gas station the retail space has to be at least 10,000 square feet. If the off-sale location has less than 5,000 square feet, at least 75% of its sales must be from alcoholic beverages. A special instructional tasting license is required.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act contains various provisions regulating the application for, the issuance of, the suspension of, and the conditions imposed upon, alcoholic beverage licenses by the Department of Alcoholic Beverage Control.
- Existing law provides for various annual fees for the issuance of alcoholic beverage licenses depending upon the type of license issued.
- The Alcoholic Beverage Control Act provides that a violation of its provisions is a misdemeanor, unless otherwise specified.
- This law authorizes the department to issue to the holder of any off-sale retail license an instructional tasting license that would allow the license holder to allow an authorized licensee, as defined, or designated representative of that licensee, to conduct, on a designated portion of, or contiguous to, an existing licensed premises, an instructional tasting event at which tastes of alcoholic beverages may be served to consumers, as provided.
- The law imposes an original fee of $300 and an annual renewal fee of $261 for the license, which would be deposited in the Alcohol Beverage Control Fund.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Licensed off-sale liquor establishments may now allow liquor companies to serve small quantities or their products to over 21 customers at "instructional tasting events".

NOTES:

UNDERAGE DRINKERS: IMMUNITY FROM PROSECUTION

Business and Professions Code Sections 25658, 25662 and 25667 (Added) Chapter 245 / Assembly Bill 1999

SUMMARY: This law grants immunity from criminal prosecution for B&P sections 25658 and 25662 to any minor that calls 911 and reports that either they or another person are in need of medical attention due to alcohol consumption. They have to be the first person to make the call and they, the caller, if not the person in need of aid, must remain on the scene until aid has arrived and cooperate with medical assistance and law enforcement.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act provides that any person under the age of 21 years who purchases any alcoholic beverage, who consumes any such beverage in any on-sale premises, or who possesses any such beverage on any street or highway or in any public place open to the public is guilty of a misdemeanor.
- Existing law also provides that any person under the age of 21 years who attempts to purchase any alcoholic beverage from a licensee, or the licensee's agent or employee, is guilty of an infraction.
- This law grants limited immunity from criminal prosecution for any person under the age of 21 years who is subject to prosecution under the above-described provisions where the person under the age of 21 years called 911 and reported that either himself or herself or another person was in need of medical assistance due to alcohol consumption and conformed to other specified requirements.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Minors may now be immune from prosecution for 25658 and 25662 B&P when they call 911 for medical aid due to alcohol consumption.

NOTES:

MARIJUANA: POSSESSION

Health and Safety Code Section 11357
Vehicle Code Section 23222
Chapter 708 / Senate Bill 1449

SUMMARY: Every person who possesses not more than 28.5 grams of marijuana is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100).

HIGHLIGHTS:

- Existing law provides that, except as authorized by law, every person who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than $100. This same penalty is imposed for the crime of possessing not more than 28.5 grams of marijuana while driving on a highway or on lands, as specified.

- Existing law provides with respect to these offenses that, under specified conditions, (1) the court shall divert and refer the defendant for education, treatment, or rehabilitation, as specified, and (2) an arrested person who gives satisfactory evidence of identity and a written promise to appear in court shall not be subjected to booking.

- This law provides that any person who commits any of the above offenses is instead guilty of an infraction punishable by a fine of not more than $100.

- This law eliminates the above-described provisions relating to booking and to diversion and referral for education, treatment, or rehabilitation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: 11357b H&S and 23222 VC are now infractions with a maximum penalty of $100.

NOTES:

ELECTRONIC CIGARETTES

Health and Safety Code Section 119405
Chapter 312 / Senate Bill 882

SUMMARY: It is an infraction to sell or furnish an electronic cigarette to a person under 18 years of age.

HIGHLIGHTS:

- Existing law contains various provisions governing cigarettes and tobacco products.
- This law makes it unlawful for a person to sell or otherwise furnish an electronic cigarette, as defined, to a person under 18 years of age and would make a violation punishable as an infraction, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law creates a new infraction making it unlawful to sell or furnish an electronic cigarette to a person under 18 years of age.

NOTES:

TRUANCY

Penal Code Section 270.1 (Added) 48263.6 Education Code (Added) Chapter 647 / Senate Bill 1317

SUMMARY: The new Education Code defines a chronic truant as any pupil subject to compulsory full-time education or to compulsory continuing education who is absent from school without a valid excuse for 10% or more of the schooldays in one school year, from the date of enrollment to the current date. 270.1 PC makes it a misdemeanor for a parent or guardian of a pupil of at least six years of age in school from kindergarten up to the eighth grade and identified as a chronic truant to fail to reasonably supervise and encourage the pupil's school attendance.

HIGHLIGHTS:

- Existing law defines a truant as any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without a valid excuse 3 full days in one school year, or tardy or absent for more than any 30-minute period during the schoolday without a valid excuse on 3 occasions in one school year, or any combination thereof.

- This law defines a chronic truant as any pupil subject to compulsory full-time education or to compulsory continuing education who is absent from school without a valid excuse for 10% or more of the schooldays in one school year, from the date of enrollment to the current date, provided that the appropriate school district officer or employee has complied with specified provisions of law.

- Existing law provides that, if a person is a parent of a minor child, he or she is guilty of a misdemeanor punishable by a fine not exceeding $2,000, or by imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment, if he or she willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance, or other remedial care for the child.

- Under existing law, the parent or guardian of a pupil, who is subject to compulsory full-time education or to compulsory continuation education, whose child is habitually truant, as defined, or fails to perform his or her duty to compel attendance of the pupil, is guilty of a crime.

- This law provides that a parent or guardian of a pupil of 6 years of age or more who is in kindergarten or any of grades 1 to 8, inclusive, and who is subject to compulsory full-time education or to compulsory continuation education, whose child is a chronic truant, who has failed to reasonably supervise and encourage the pupil's school attendance, and who has been offered language accessible support services to address the pupil's truancy, is guilty of a misdemeanor punishable by a fine not exceeding $2,000, or by imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment.

- The law provides that a parent or guardian may not be punished for a violation of both these provisions and another specified law involving criminal liability for parents or guardians of truant children.

- The law authorizes a superior court to establish a deferred entry of judgment program, meeting specified conditions, to adjudicate cases involving parents or guardians of elementary school pupils who are chronic truants.

- The law authorizes a deferred entry of judgment program established under the bill to refer defendant parents or guardians for services, including, but not necessarily limited to, case management, mental and physical health services, parenting classes and support, substance abuse treatment, and child care and housing.

- The law authorizes the deferment of entry of judgment in these cases upon the defendant's compliance with terms and conditions set forth by the court.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Parents and guardians of K-8 students who miss 10% or more of school due to truancy can be charged with a misdemeanor.

NOTES:

GANG INJUNCTIONS: VIOLATIONS: CONTEMPT OF COURT

Penal Code Section 166
Chapter 677 / Assembly Bill 2632

SUMMARY: This law adds "Willful disobedience of the terms of any injunction that restrains the activities of a criminal street gang or any of its members, lawfully issued by ay court, including an order pending trial" to contempt of court misdemeanors.

HIGHLIGHTS:

- Existing law provides for injunctive relief from the unlawful activities of criminal street gangs.
- Existing law provides that disobedience of the terms of any court order constitutes a contempt of court, and is punishable as a misdemeanor.
- This law specifies that disobedience of the terms of an injunction that restrains the activities of a criminal street gang or any of its members constitutes contempt of court, and is punishable as a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It's now a misdemeanor for a gang member to violate the terms of a court ordered gang injunction.

NOTES:

INTERCEPTED COMMUNICATIONS: HOSTAGE TAKING AND BARRICADING

Penal Code Section 633.8 (Added)
Chapter 380 / Assembly Bill 2210

SUMMARY: This law allows a designated peace officer to use an electronic amplifying or recording device to eavesdrop on, or record, or both, without a warrant, any oral communication within a particular location in response to an emergency situation involving the taking of a hostage or hostages or the barricading of a location and is not required to knock and announce their presence before entering, installing and using any electronic amplifying or recording devices. The officer must be pre-designated by a County District Attorney or the State Attorney General.

HIGHLIGHTS:

- Existing law prohibits a person from intentionally eavesdropping upon or recording a confidential communication by means of any electronic amplifying device or recording device without the consent of all parties to the communication.

- Under existing law, specified law enforcement agents may make a written application to a judge to authorize the interception of a wire, electronic pager, or electronic cellular telephone communication. In certain instances the application can be made informally and granted orally if an emergency situation exists, as specified.

- This law authorizes a peace officer who is authorized by a county district attorney or the Attorney General to authorize the use of an electronic amplifying or recording device to eavesdrop on or record, or both, any oral communication in an emergency situation involving a barricade situation or hostage situation, as defined, if the peace officer reasonably determines that an emergency situation exists, that the emergency situation requires that the eavesdropping occur immediately, and that there are grounds upon which an order could be obtained in regard to certain specified offenses.

- This law requires a written application to be made seeking to authorize the eavesdropping within 48 hours.

- **WHAT THIS BILL MEANS TO LAW ENFORCEMENT:** A peace officer, specially designated by the County District Attorney or the Attorney General, may now eavesdrop on hostage and barricaded suspect incidents without a warrant providing they determine that an emergency situation exists and file a written application seeking authorization within 48 hours after eavesdropping begins.

NOTES:

CRIMINAL INVESTIGATION: INTERCEPTION OF COMMUNICATION

Penal Code Sections 629.50, 629.51, 629.52, 629.53, 629.54, 629.56, 629.58, 629.60, 629.62, 629.64, 629.66, 629.68, 629.70, 629.72, 629.74, 629.76, 629.78, 629.80, 629.82, 629.86, 629.88, 629.89, 629.90 and 629.94.
Chapter 707 / Senate Bill 1428

SUMMARY: This law changes "electronic digital pager or electronic cellular communications" to "electronic communications" and defines it as any transfer of signs, signals, writings, images, sounds, data, or intelligence by a wire, radio, electromagnetic, photoelectric, or photo-optical system, with specified exceptions. A wiretap cannot be in place longer than is necessary to achieve the objective, nor in any event longer than 30 days commencing on the day of the initial interception, or 10 days after the issuance of the order, whichever comes first. After obtaining an oral approval, a filing with the judge must now be made by midnight of the second full court day instead of 48 hours later. The written report requirement is changed from every six days to every ten days commencing with the date the order was signed. And the contents of any wire or electronic communication may also be disclosed to any judge or magistrate in the state.

HIGHLIGHTS:

- Existing law allows for an application authorizing the interception of a wire, electronic pager, or electronic cellular telephone to be made by the Attorney General or a district attorney to a judge of a superior court, as specified.
- Existing law defines wire communication, electronic pager communication, and electronic cellular telephone communication for these purposes.
- This law deletes the references to electronic pager communication and electronic cellular telephone communication and replace those references with references to electronic communication.
- The law defines electronic communication as any transfer of signs, signals, writings, images, sounds, data, or intelligence by a wire, radio, electromagnetic, photoelectric, or photo-optical system, with specified exceptions.
- This law thereby authorizes the above persons to make an application for an order permitting the interception of electronic communications, as defined.
- Under existing law an application for a communications interception may be made informally and granted orally if an emergency situation exists, and other factors are present.
- Existing law conditions the oral grant of the informal application on the filing of a written application for an order within 48 hours of the oral approval.
- This law conditions the granting of an oral approval on the filing of a written application by midnight of the second full court day after the oral approval is made.
- Under existing law an order may not authorize a communications interception for longer than a

maximum of 30 days.

- This law provides that the 30 days would not commence until the day of the actual initial interception, or 10 days after the issuance of the order, whichever comes first.
- Existing law requires an order for a communications interception to require that written reports be made to the judge authorizing the interception, as provided.
- Existing law requires that a report be filed at least every 6 days until the authorization is terminated.
- This law requires the reports to be made every 10 days, commencing with the date of the signing of the order authorizing the interception.
- Existing law specifies obligations for parties applying for and carrying out orders to intercept communication, and makes a violation of these provisions a misdemeanor or felony.
- This bill would broaden the types of communication to which these crimes would apply.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The above changes update California's wiretapping law to include interception of communications by e-mail, blackberry, instant messaging by phone and other forms of contemporaneous two-way electronic communication. These changes also amend the current 6-day report requirements to a 10-day reporting requirement.

NOTES:

IMPERSONATION: INTERNET

Penal Code Section 528.5 (Added)
Chapter 335 / Senate Bill 1411

SUMMARY: This law states that any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a misdemeanor.

HIGHLIGHTS:

- Existing law makes it a crime to falsely impersonate another in either his or her private or official capacity, as specified.
- Existing law also makes it a crime to knowingly access and, without permission, alter, damage, delete, destroy, or otherwise use any data, computer, computer system, or computer network in order to devise or execute any scheme or artifice to defraud, deceive, or extort, or wrongfully control or obtain money, property, or data. For a violation thereof, in addition to specified criminal penalties, existing law authorizes an aggrieved party to bring a civil action against the violator, as specified.
- This law provides that any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means, as specified, for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a misdemeanor.
- The law, in addition to the specified criminal penalties, authorizes a person who suffers damage or loss to bring a civil action against any person who violates that provision, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now a misdemeanor to impersonate another actual person on the internet with the intent to harm, intimidate, threaten or defraud them.

NOTES:

WEAPONS: POSSESSION AT STATE CAPITOL AND LEGISLATIVE BUILDINGS

Penal Code Sections 12021 and 171c (Repealed and Added)
Chapter 689 / Assembly Bill 2668

SUMMARY: It's now a misdemeanor to possess any firearm, deadly weapon, fixed four inch knife, unauthorized tear gas, stun gun, BB or pellet gun, any ammunition or any explosive in State Capital and other State Government offices where it previously had been a crime to bring a loaded firearm. The area must be posted with a statement of prosecution. And persons convicted of new Section 171c are prohibited from owning, buying, receiving or possessing a firearm within 10 years of the conviction.

HIGHLIGHTS:

- Existing law makes it a crime for any person, with the exception of peace officers, to bring a loaded firearm into, or possess a loaded firearm within, the State Capitol, as specified.

- This law repeals and recasts these provisions and would make it a crime, punishable by imprisonment in a county jail for a period not to exceed one year, a fine not exceeding $1,000, or by both that fine and imprisonment, or by imprisonment in state prison, to bring a loaded firearm into, or possess a loaded firearm within, the State Capitol and any of other specified locations of significance to the conduct of the Legislature and constitutional officers.

- The law also makes it a misdemeanor, punishable by imprisonment in a county jail for a period not to exceed one year, or by a fine not exceeding $1,000, or by both that fine and imprisonment, to bring or possess specified weapons or ammunition within the State Capitol or in any of other specified locations of significance to the conduct of the Legislature, if the area is posted with a statement providing reasonable notice that prosecution may result from possession of the weapons or ammunition.

- The weapons restricted by this law would include any firearm, any deadly weapon, as defined, any knife with a blade length in excess of 4 inches with a fixed blade or capable of being fixed in an unguarded position, any unauthorized tear gas weapon, any stun gun, any instrument that expels a metallic projectile, and any explosive.

- This law excludes from its provisions peace officers, peace officers of another state or the federal government who are carrying out official duties, persons summoned by these peace officers, persons holding a valid license to carry a firearm who have permission from the Chief Sergeants at Arms of the State Assembly and the State Senate to possess a concealed weapon on the premises, and any person who has permission granted from the Chief Sergeants at Arms of the State Assembly and the State Senate to possess a weapon on the premises.

- Existing law provides that a person convicted of specified misdemeanor crimes who, within 10 years of the conviction, owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a public offense, which shall be punished as specified.

- This law adds to this list of specified misdemeanor crimes the offense of possession of a loaded firearm in specified locations of significance to the Legislature or constitutional officers, as described above.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: New weapons are illegal to possess in State offices when the area is posted as such.

NOTES:

BODY ARMOR

Penal Code Section 12370
Chapter 21 / Senate Bill 408

SUMMARY: This law adds a definition of body armor as “any bullet-resistant material intended to provide ballistic protection and trauma protection for the person wearing the body armor” in order to comply with People v. Saleem (later granted review by the California Supreme Court and, after these amendments, review was dismissed). It remains unlawful for a violent felon to purchase, own or possess.

HIGHLIGHTS:

- Existing law provides that any person who has been convicted of a violent felony who purchases, owns, or possesses body armor, as defined in the California Code of Regulations, except as authorized, is guilty of a felony, punishable by imprisonment in a state prison for 16 months or 2 or 3 years.

- However, the court, in People v. Saleem (102 Cal.Rptr.3d 652), held that this provision is unconstitutionally vague in violation of due process.

- This law changes the definition of "body armor" for purposes of this provision to mean any bullet-resistant material intended to provide ballistic and trauma protection for the person wearing the body armor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: So that the definition of body armor is no longer vague it is defined in 12370 PC. Violent felons may still not buy, own or possess it.

NOTES:

GRAND THEFT: PROPERTY VALUE THRESHOLD

Penal Code Section 487
Chapter 693 / Assembly Bill 2372

SUMMARY: This law increases the value threshold for grand theft from $400 to $950.

HIGHLIGHTS:

- Existing law generally provides that grand theft is theft when the money, labor, or real or personal property taken is of a value exceeding $400.
- This law increases the value threshold for committing grand theft from $400 to $950.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The threshold for grand theft is increased from $400 to $950.

NOTES:

GRAND THEFT: FARM CROPS

Penal Code Section 487
Chapter 694 / Senate Bill 1338

SUMMARY: This law re-states the changes that went onto effect January 25, 2010 concerning the increased threshold from $100 to $250 for domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops and specifies the value for all the listed items is now based upon wholesale value.

HIGHLIGHTS:

- Existing law provides that grand theft is committed when domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding $250.
- Existing law provides a method for establishing the value of avocados or citrus fruit for purposes of this offense based on wholesale value.
- This law provides that this same method may be used to establish the value of the other products listed above for purposes of determining if a taking is grand theft.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: The $250 value of domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops is based upon wholesale value.

NOTES:

TRANSIT: PUBLIC TRANSIT FACILITIES

Penal Code Sections 602, 640 and 171.7 (Added)
Chapter 675 / Assembly Bill 2324

SUMMARY: This law adds public transit facilities to airport operations area and passenger vessel terminals where it is unlawful to possess specified weapons and other items within any sterile area. It also makes it a misdemeanor to willfully tamper with, remove, displace, injure, or destroy any part of any facility or vehicle of a public transportation system. It also increases the severity of the following offenses from infractions to misdemeanors that are committed on or in any facility or vehicle; disturbing others, carrying an explosive, acid or flammable liquid, defecating, blocking the free movement of another person, or tampering with, removing, displacing, injuring or destroying any part of a facility or vehicle. And there are specific prohibited items for public transit systems sterile areas; any firearm or imitation firearm, a BB or pellet gun, a paint ball gun, a practice or replica hand grenade, an unauthorized tear gas weapon, or any undetectable knife. The sterile area is any portion of a public transit facility that is generally controlled in a manner consistent with the public transit authority's security plan.

HIGHLIGHTS:

- Existing law prohibits a person from knowingly possessing specified weapons and other items within any sterile area, as defined, of an airport or passenger vessel terminal, except as specified.
- This law makes it a misdemeanor, punishable as specified, for any person to knowingly possess at a public transit vehicle facility, as defined, specified weapons, if a notice is posted at the facility, as specified.
- Existing law prohibits an unauthorized person from knowingly entering any airport operations area or passenger vessel terminal, as defined, if the area has been posted with certain notices, and makes this conduct punishable by a fine.
- Existing law provides that a violation of this provision is punishable by a specified fine or term of imprisonment, or both, if the person refuses to leave the area after being requested to do so by a peace officer or authorized personnel.
- This law applies these prohibitions and penalties, in addition, to knowingly entering, and to entering and refusing to leave, a public transit facility, as defined.
- Existing law prohibits a person from intentionally avoiding submission to screening and inspection when entering or reentering a sterile area of an airport or passenger vessel terminal, except as specified.
- Existing law provides that a violation of this prohibition that is responsible for the evacuation of an airport terminal or passenger vessel terminal is punishable by not more than one year in a county jail under certain circumstances.
- This law applies this prohibition, in addition, to the sterile area of a public transit facility, if a notice is posted at the facility, as specified.

- This law recasts the penalties for avoiding submission to screening to impose a $500 fine for a first offense that does not result in an evacuation or delay, and a fine of $1,000 and imprisonment of not more than one year in a county jail for any 2nd or subsequent offense. For a first offense that results in the evacuation of the terminal or facility, as specified, this bill would impose a penalty of not more than one year in a county jail.

- Existing law provides that it is an infraction, punishable by a fine not to exceed $250 and by specified community service, to evade the payment of any fare of, or engage in specified passenger misconduct on or in, a described facility or vehicle.

- This law recasts these provisions, making some of these acts of misconduct misdemeanors upon a first offense, making others misdemeanors upon the 3rd or subsequent offense, while providing that some would remain as infractions, as specified.

- The law additionally makes it a misdemeanor to willfully tamper with, remove, displace, injure, or destroy any part of any facility or vehicle of a public transportation system.

- Existing law makes it an infraction to carry an explosive or acid, flammable liquid, or toxic or hazardous materials in a public transit facility or vehicle.

- This law instead makes it a misdemeanor, punishable as specified, to carry explosives, acids, or flammable liquids in a public transit facility or vehicle.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Public transit systems are added to airport operations area and passenger vessel terminal in 602 PC and afforded the same protection. Some 640 PC infractions were elevated to misdemeanors. New section 171.7 identifies specific items that are prohibited in a public transit system sterile or secure area.

NOTES:

TRESPASS

Penal Code Section 602
Chapter 531 / Assembly Bill 668

SUMMARY: This law expands the scope of trespassing by providing that during a specified timeframe it is unlawful for a person who has been convicted of any felony, any misdemeanor, or a specified infraction, committed upon a particular private property, to enter or refuse or fail to leave that property after being informed by a peace officer that the property is not open to the particular person, or to refuse or fail to leave when asked. The time frames from the date of conviction are; a violent felony is unlimited, a felony is five years, a misdemeanor is two years and petty theft charged as an infraction is one year.

HIGHLIGHTS:

- Existing law makes it unlawful for persons to engage in certain acts of trespass. In particular it is unlawful for a person who has been convicted of a violent felony committed upon a particular private property to enter upon that property after having been informed by a peace officer that the property is not open to the particular person; or to refuse or fail to leave the property upon being asked to leave the property, as specified.

- This law expands the scope of this offense by providing that during a specified timeframe it is unlawful for a person who has been convicted of any felony, any misdemeanor, or a specified infraction, committed upon a particular private property, to enter or refuse or fail to leave that property after being informed by a peace officer that the property is not open to the particular person, or to refuse or fail to leave when asked, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Felonies, misdemeanors and petty theft charged as an infraction are added to the types of crimes for which a particular person is convicted and can be arrested for trespass per 602 (t) PC.

NOTES:

TRESPASSING: ANIMAL ENCLOSURES

Penal Code Sections 19.8 and 602.13 (Added)
Chapter 536 / Assembly Bill 1675

SUMMARY: This law makes it an optional infraction/misdemeanor to enter an animal enclosure at a zoo, a public aquarium, a circus or traveling animal exhibit, if posted to prohibit entrance, without the consent of the governing authority of the zoo, circus, or traveling animal exhibit, or a representative of that governing authority .

HIGHLIGHTS:

- Under existing law, every person who willfully enters and occupies real property without the consent of the owner, owner's agent, or person in lawful possession, is guilty of a misdemeanor.
- This law, with exemptions for employees and public officers, makes it an infraction or a misdemeanor to enter an animal enclosure at a zoo, defined to include a public aquarium, or at a circus or traveling animal exhibit, if posted as specified to prohibit entrance, without the consent of the governing authority of the zoo, circus, or traveling animal exhibit, or a representative of that governing authority.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to enter a commercial animal enclosure without consent, providing the property is posted.

NOTES:

RESIDENTIAL TENANCIES: DOMESTIC VIOLENCE

Civil Code Sections 1941.5 and 1941.6
Code of Civil Procedure 1161.3 (Added)
Chapter 626 / Senate Bill 782

SUMMARY: This civil procedure prohibits landlords from terminating or failing to renew a tenancy of a victim of domestic violence, sexual assault or stalking if the tenant obtains a court order or files a police report and the landlord does not reasonably believe that the presence of the person named in the protection order or police report poses a physical threat to other tenants, guests, invitees, licensees or to a tenant's right to a quiet possession of the property or if the tenant invites the named person back to the property. The civil code also requires landlords to change the locks within twenty-four hours after a tenant requests them to and provides them with a copy of the court order or police report. If the landlord fails to change the locks the tenant can change them and give the landlord a key, provided they do it in a workmanlike manner and replace them with similar or better locks.

HIGHLIGHTS:

- This Existing law governs the hiring of real property based on the terms of the agreement, or on the behavior of the parties. Under existing law, a tenant may notify the landlord in writing that he or she, or a household member, was a victim of an act of domestic violence, sexual assault, or stalking, and intends to terminate the tenancy. The tenant is released from any rent payment obligation 30 days following the giving of the notice, or as specified.

- Existing law establishes the criteria for determining when a tenant is guilty of unlawful detainer of a premises, and includes committing nuisance in this regard.

- Existing law provides, until January 1, 2012, for the purposes of the law of unlawful detainer, that if a person commits any specified act or acts of domestic violence, sexual assault, or stalking against another tenant or subtenant on the premises, there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance on the premises if the victim or a member of the victim's household has not vacated the premises.

- This law, except as specified, prohibits a landlord from terminating a tenancy or failing to renew a tenancy based upon an act of domestic violence, sexual assault, or stalking against a protected tenant, as defined, or a protected tenant's household member when that act is documented, as specified, and the person who is restrained from contact with the protected tenant under a court order, as defined, or is named in a police report of that act is not a tenant of the same dwelling unit.

- The law requires the landlord to change the locks, as defined, within 24 hours of a written request, as specified, when the restrained person is not a tenant of the same dwelling unit.

- The law also requires, under specified circumstances, the landlord to change the locks when the restrained person is a tenant of the same dwelling unit.

- The law declares the landlord not liable to a restrained person who is excluded from the dwelling unit if the locks are changed pursuant to that provision.

- The law states that a restrained person who has been excluded from a dwelling unit under that provision remains liable under the lease with all other tenants of the dwelling unit for rent as provided in the lease.

- The law authorizes a protected tenant to change the locks without the landlord's permission, as specified, notwithstanding any provision in the lease to the contrary, if the landlord does not change the locks within 24 hours, as specified, with regard to leases executed on or after the date the bill would take effect.

- The law also specifies the manner in which a protected tenant is required to change the locks if the protected tenant changes the locks without the permission of the landlord.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Peace officers can better assist domestic violence, sexual assault and stalking victims by informing them about Civil Codes 1941.5, 1941.6 and Code of Civil Procedure 1161.3.

NOTES:

SEX OFFENDERS: PAROLE: PETTY THEFT

Penal Code Sections 666 and 3053.8 (Added)
Chapter 219 / Assembly Bill 1844

SUMMARY: Petty theft with a prior now requires 3 or more convictions of the listed offenses, except those persons who are required to register as sex offenders and those that have a prior violent or serious felony conviction need only one prior conviction of the listed offenses for which felony petty theft can be charged. It is a new condition of parole for sex offenders convicted of certain specified sex offenses where the victim was under 14 that they are not allowed to enter any park where children regularly gather without their parole officer's permission. (This new legislation also changes periods of parole and criminal sentencing terms that will not be covered here.)

HIGHLIGHTS: (Abbreviated)

- Existing law makes it unlawful for a person who is required to register as a sex offender to reside within 2,000 feet of a public or private school, or park where children regularly gather.

- Existing law also provides that any person required to register as a sex offender who comes into any school building or upon any school ground without lawful business and written permission is guilty of a misdemeanor.

- This law makes it a misdemeanor for a person who is on parole for specified sex offenses to enter any park where children regularly gather without express permission from the person's parole agent.

- Existing law provides that petty theft is a misdemeanor, except that every person who, having been convicted of petty theft, grand theft, auto theft, burglary, carjacking, robbery, or receiving stolen property and having served time in a penal institution therefore, is subsequently convicted of petty theft, is punishable by imprisonment in a county jail not exceeding one year, or in the state prison.

- This law requires that most persons be convicted 3 or more times of a qualifying offense to be subject to imprisonment in the state prison for petty theft. Persons required to register as sex offenders, or with a prior serious or violent felony conviction, who have been convicted and imprisoned for the commission of specified crimes, including, among others, petty theft, auto theft, burglary, carjacking, or robbery, would remain subject to imprisonment in the state prison with one prior qualifying offense.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Charging petty theft as a felony now requires three previous convictions of the listed offenses except those people convicted of serious or violent felonies and registered sex offenders still only need one conviction to qualify. Parolees may not be allowed to enter any park where children regularly gather if they were convicted of a sex crime involving a victim under 14 years of age.

NOTES:

CHANGES IN

TRAFFIC

LAW

MOTORCYCLE THEFT

Penal Code Section 466.65
Chapter 120 / Assembly Bill 1848

SUMMARY: This law makes it a misdemeanor for a person to possess, give, or lend any device designed to bypass the factory-installed ignition of a motorcycle in order to start the engine without a manufacturer's key. This law also makes it a misdemeanor to possess, give, or lend any motorcycle ignition or part of a motorcycle ignition, with the intent to unlawfully take or drive, or to facilitate the unlawful taking or driving of a motorcycle, without the consent of the owner. Finally, this new law makes it a misdemeanor for a person to possess, give, or lend items of hardware, including, bolt cutters, electrical tape, wire cutters, wire strippers, or allen wrenches, with the intent to unlawfully take or drive, or to aid in the unlawful taking or driving of a motorcycle without the consent of the owner.

HIGHLIGHTS:

- Existing law provides that every person who, with the intent to use it in the commission of an unlawful act, possesses a motor vehicle master key or a motor vehicle wheel lock master key is guilty of a misdemeanor.

- Existing law provides that every person who, with the intent to use it in the commission of an unlawful act, uses a motor vehicle master key to open a lock or operate the ignition switch of any motor vehicle or uses a motor vehicle wheel lock master key to open a wheel lock on any motor vehicle is guilty of a misdemeanor.

- Existing law provides that every person who knowingly manufactures for sale, advertises for sale, offers for sale, or sells a motor vehicle master key or a motor vehicle wheel lock master key, except to persons who use such keys in their lawful occupations or businesses, is guilty of a misdemeanor.

- This law will prohibit anyone from possessing motorcycle theft devices designed to bypass the factory installed ignition in order to facilitate the unlawful taking of a motorcycle without the consent of the owner.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law will close a loophole in current law regarding motorcycle theft. Currently, Section 466 PC prohibits possession of “burglary tools,” such as slim jims and shaved keys, since it is a “burglary” to enter a locked vehicle. Also prohibited are “other instruments or tools” with the intent to commit burglary. However, Section 466 PC does not apply to motorcycles because these items are not illegal to possess if the possessor intends to steal a motorcycle because that crime does not involve burglary.

NOTES:

TRANSPORTATION: OMNIBUS BILL

Vehicle Code Sections 667, 5201, and 2511.55
Chapter 491 / Senate Bill 1318

SUMMARY: This new law makes several clean-up, clarifying, and conforming changes to transportation-related law. Only the most significant statutes that affect peace officers are included in the "highlights" section.

HIGHLIGHTS:

Section 5201 VC was amended to require license plates to be mounted parallel to the ground so the characters are upright and display from the left to the right.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers may make an enforcement stop on a motor vehicle if the vehicle's license plate is mounted in any position other than parallel to the ground with the characters upright, and displayed from left to right.

NOTES:

ALL TERRAIN VEHICLE AGRICULTURE OPERATIONS

Vehicle Code Section 36005
Chapter 110 / Senate Bill 1229

SUMMARY: Vehicle Code section 36005 has added ATVs as an implement of husbandry. This means that ATVs are exempt from certain vehicle registration and operator licensing requirements.

HIGHLIGHTS:

- Existing law includes as an implement of husbandry a vehicle which is used exclusively in the conduct of agricultural operations.
- This law would add an all-terrain vehicle used in agricultural operations as an implement of husbandry.
- As an implement of husbandry, an ATV may be incidentally operated upon or moved across a highway.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: ATVs are exempt from certain vehicle registration and operator licensing requirements.

NOTES:

VIDEO EVENT RECORDER

Vehicle Code Section 26708
Chapter 458 / Assembly Bill 1942

SUMMARY: This law allows a video event recorder to be mounted in a 7-inch square in the lower corner of a vehicle windshield farthest from the driver or in a 5-inch square in the lower corner of the windshield nearest the driver and outside of an airbag deployment zone, or a 5-inch square mounted to the center uppermost portion of the interior of the windshield. This new law also defines a video event recorder and requires a vehicle equipped with a video even recorder to have a notice posted in a visible location which states that a passenger's conversation may be recorded. This law also requires video event recorders to store no more than 30 seconds before and after a triggering event and would allow the registered owner or lessee of the vehicle to disable the device. This law specifies that the data recorded to the device is the property of the registered owner or lessee of the vehicle and when a person is driving for hire as an employee in a vehicle with a video event recorder, the person's employer would be required to provide unedited copies of the recordings upon the request of the employee or the employee's representative free of charge to the employee and within five days of the event.

HIGHLIGHTS:

Existing law prohibits any person from driving a motor vehicle with any object placed, displayed, installed, affixed, or applied in or upon the vehicle which obstructs or reduces the driver's clear view through the windshield or side windows.

This law allows video event recorders to be mounted in a 7-inch square in the lower corner of the windshield farthest removed from the driver or in a 5-inch square in the lower corner of the windshield nearest the driver and outside of an airbag deployment zone or in a 5-inch square mounted to the center uppermost portion of the interior of the windshield. This law also defines a video event recorder as a video recorder that continuously records in a digital loop, recording audio, video, and G-force levels, but saves video only when triggered by an unusual motion or crash or when operated by the driver to monitor driver performance. This law also specifies the following:

- A vehicle equipped with a video event recorder would be required to have a notice posted in a visible location which states that a passenger's conversation may be recorded.
- Video event recorders would store no more than 30 seconds before and after a triggering event.
- The registered owner or lessee of the vehicle would be allowed to disable the device.
- The data recorded to the device is the property of the registered owner or lessee of the vehicle.

When a person is driving for hire as an employee in a vehicle with a video event recorder, the person's employer would need to provide unedited copies of the recordings upon the request of the employee or the employee's representative. These copies would be provided free of charge to the employee and within five days of the request.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Video event recorders highlight potential driver safety violations, especially in the commercial vehicle industry. The devices are a proven deterrent to help prevent many behavioral problems. The video recorder is a constant reminder that the driver's actions are being recorded and can later be weighed or evaluated by management. In a time of recession where job security is in doubt, this may be the additional encouragement for commercial vehicle drivers to perform at their best in their own self-interest of continued employment.

Video event recorders act as an expert witness. Recorded video evidence has and can be used in court as long as legal guidelines are followed. Video event recorders provide a means to verify or dismiss actions and events that may be claimed by individuals and would defend a driver, school district, company, etc. against liability lawsuits.

NOTES:

COMMERCIAL DRIVER'S LICENSES: SUSPENSION OR REVOCATION

Vehicle Code Section 13557
Chapter 244 / Assembly Bill 1928

SUMMARY: This law adds, as one of the specified facts to ensure that a driver's license (DL) suspension cannot be overturned at a Department of Motor Vehicles (DMV) Administrative Per Se (APS) hearing, that a person was driving a commercial vehicle with a blood alcohol concentration (BAC) of at least 0.04 percent or that a person on probation for a DUI violation was found to have been driving with a BAC of 0.01 or more.

HIGHLIGHTS:

Existing law requires the DMV to immediately suspend the privilege of a person to operate a motor vehicle for any one of the following reasons:

- The person was driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood.
- The person was under 21 years of age and had a blood-alcohol concentration of 0.01 percent or greater, as measured by a PAS test, or other chemical test.
- The person was driving a vehicle that requires a commercial driver license when the person had 0.04 percent or more, by weight, of alcohol in his or her blood.
- The person was driving a motor vehicle when both of the following applied:
- The person was on probation for a violation of Section 23152 VC or Section 23153 VC.
- The person had 0.01 percent or more, by weight, of alcohol in his or her blood, as measured by a preliminary alcohol screening test or other chemical test.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law is in response to recent case law and potential loopholes involving commercial driver APS suspensions. In Rahmen v. DMV (178 Cal. App. 4th 581 2009), the court determined that it was Legislature's intent to harmonize the heightened standard for commercial vehicle operators with existing punishments, although it is not expressly stated in the Vehicle Code. Because of this discrepancy, the court determined that applying the law literally, would lead to the issuance of orders of suspension that could never be effective. The court concluded that a BAC of 0.04 percent or more was sufficient both to suspend Rehman's DL and uphold the order of suspension following the hearing. This legislation will effectively close this loophole and enhance existing law and ensure commercial drivers and individuals are unable to circumvent their APS license suspension by requesting a DMV hearing.

NOTES:

INSTRUCTION PERMIT: MOTORCYCLES

Vehicle Code Sections 12509 and 12509.5
Chapter 568 / Assembly Bill 1952

SUMMARY: This law requires a person who is under 21 years of age to obtain and hold, for six months, an instruction permit prior to applying for a class M1 or M2 driver's license (DL) to operate a two-wheel motorcycle, motor-driven cycle, motorized scooter, motorized bicycle, moped, or bicycle with an attached motor. This law requires a minor between the ages of 15 ½ years of age and 18 years of age to have a valid class C driver's license or complete driver education and training, successfully complete a motorcycle safety course administered by the California Highway Patrol (CHP), and pass the motorcycle driver's written exam in order to obtain an instruction permit. If the person is 18 years of age or older, but under 21 years of age, the applicant will be required to successfully complete a motorcycle safety course administered by the CHP and pass the motorcycle driver's written exam. If the person is 21 years of age or older, the applicant will have to pass the motorcycle driver's written exam. This law specifies that the instruction permit would be valid for 24 months. This law specifies that a person who is 21 years of age or over, while having in his or her immediate possession a valid permit will be allowed to operate a motor vehicle, other than a motorcycle, motorized scooter, or a motorized bicycle, when accompanied by, and under the immediate supervision of, a California licensed driver with a valid license of the appropriate class, whose driving privilege is not on probation.

HIGHLIGHTS:

Existing law allows the Department of Motor Vehicles (DMV) to issue an instruction permit to an applicant who is 15 years and six months of age or older who has either completed driver training or is taking a driver training program. An instruction permit can also be issued to an applicant over the age of 16 years who is applying for a restricted driver's license or to an applicant over the age of 17 years and six months. A minor in possession of an instruction permit is prohibited from driving without being under the immediate supervision of a California licensed driver 18 years or older with a valid license, whose driving privilege is not on probation. An instruction permit issued under the section, entitles the applicant to operate a vehicle upon the highways for a period not exceeding two years from the date of the application.

A person who has a valid instruction permit pursuant to Section 12509 VC, may in addition to driving a motor vehicle, also operate a motorcycle, motorized scooter, or a motorized bicycle. Operation of a motorcycle, motor-driven cycle, and motorized bicycle during night and at anytime on a freeway is prohibited by this section.

This law requires a person to obtain an instruction permit prior to operating, or applying for a class M1 or M2 DL to operate a two-wheel motorcycle, motor-driven cycle, motorized scooter, motorized bicycle, moped, or bicycle with an attached motor. The person would need to meet the following requirements to obtain an instruction permit for purposes of this section:

- If age 15 years and six months or older, but under the age of 18, the applicant must meet all of the following requirements:
    - Have a valid class C license or complete driver education and training.
    - Successfully complete a motorcycle safety course administered by the CHP.
    - Pass a motorcycle driver's written exam.
    - A person described would be required to hold an instruction permit issued pursuant to this section for a minimum of six months prior to being issued a class M1 or M2 license.

- If 18 years of age or older, but under 21 years of age, the applicant shall meet all of the following requirements:
    - Successfully complete a motorcycle safety course administered by the CHP.
    - Pass a motorcycle driver's written exam.
    - A person described would be required to hold an instruction permit issued pursuant to this section for a minimum of six months prior to being issued a class M1 or M2 license.

- If 21 years of age or older, the applicant must meet the following requirement:
    - Pass the motorcycle driver's written exam.

A person issued an instruction permit will not be allowed to operate a two-wheel motorcycle, motor-driven cycle, motorized scooter, motorized bicycle, moped, or bicycle with an attached motor during the hours of darkness, would be required to stay off any freeways that have full control of access and have no crossings at grade, and would be prohibited from carrying any passenger except an licensed instructor. An instruction permit issued pursuant to this section would be valid for a period not to exceed 24 months.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Under current instructional permit law, a minor who obtains an instructional permit and has completed approved courses in automobile education and driver training may operate a motorcycle. This bill seeks to add the requirement that a person under the age of 21 would be required to successfully complete a California motorcycle safety program (CMSP) as well. The CMSP is designed for beginning riders and provides five hours of classroom instruction and ten hours of practical riding exercises in a controlled, off-street environment. There are currently 129 locations throughout the state that offer basic rider training courses through the CHP motorcycle safety training program. This bill could potentially reduce the risk of injuries and fatalities among minors seeking to ride a motorcycle.

NOTES:

DEPARTMENT OF MOTOR VEHICLES: RECORDS: CONFIDENTIALITY

Vehicle Code Sections 1808.4 and 2431
Chapter 280 / Senate Bill 938

SUMMARY: This new law prohibits the family members of certain public officials and law enforcement officers from having a Department of Motor Vehicles (DMV) confidential home address if they have been convicted of a crime and are on active parole or active probation.

HIGHLIGHTS:

Section 1808.4 VC was amended to allow the DMV to disclose the home address of spouses, surviving spouses, or children of specified public employees and officials if they were convicted of a crime and are on active parole or active probation. For requests made on or after January 1, 2011, the person requesting confidentiality for their spouse or child is required to declare, at the time of the request for confidentiality, whether the spouse or child has been convicted of a crime and is on active parole or probation. Neither the listed person's employer nor the DMV are required to verify, or be responsible for verifying, that a person was convicted of a crime and is on active parole or probation.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law will prohibit individuals on active parole or active probation from obtaining confidential home addresses through the DMV.

NOTES:

ELECTRONIC TOLL COLLECTION MECHANISMS: DISCLOSURE OF PERSONAL DATA

Streets and Highways Code Section 31490
Chapter 708 / Senate Bill 1268

SUMMARY: This new law prohibits transportation agencies (TAs) from selling or disseminating personal information about individuals who subscribe to electronic toll or fare payment systems. It also requires TAs to establish a privacy policy regarding the collection and use of personally-identifiable information (PII) and to provide subscribers with a copy of the privacy policy. This new law allows a TA to release the PII of a person to a law enforcement agency under specified circumstances. It also authorizes a person whose PII has been sold or provided in violation of the provisions of this law to bring legal action for recovery of damages, costs, and attorney fees.

HIGHLIGHTS:

A TA that employs an electronic toll collection system is required to establish a privacy policy regarding the collection and use of PII. It is also required to provide its subscribers with a copy of the privacy policy in an obvious manner, as well as to post its privacy policy on its Internet Web site in a conspicuous way. This policy is required to include the following:

- The types of PII collected by the agency.
- The categories of third-party persons/entities with which the agency may share PII.
- The process by which the TA notifies subscribers of changes to its privacy policy. The effective date of the privacy policy.
- The process by which a subscriber may review and request changes to any of his or her PII.

A TA is allowed to make the personal information available to a law enforcement agency pursuant to a search warrant. Unless expressly stated otherwise in the search warrant, the law enforcement agency is then required to notify the subscriber within five days that his or her records have been obtained. The law enforcement agency is also required to provide the subscriber with a copy of the search warrant and the identity of the law enforcement agency or peace officer to whom the records were provided. Additionally, a peace officer would not be prohibited from obtaining PII of a person when conducting a criminal or traffic collision investigation without a search warrant, if the officer has good cause to believe that a delay in obtaining this information by seeking a search warrant would cause an adverse result.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement officers will be allowed access to PII when conducting a criminal or traffic collision investigation if a search warrant is obtained. However, a peace officer would not be prohibited from obtaining PII of a person when conducting a criminal or traffic collision investigation without a search warrant, if the officer has good cause to believe that a delay in obtaining this information by seeking a search warrant would cause an adverse result.

NOTES:

EMERGENCY ALERT SYSTEMS: BLUE ALERTS

Government Code Section 8594.5
Chapter 311 / Senate Bill 839

SUMMARY: This new law requires the California Highway Patrol (CHP) to activate the Emergency Alert System (EAS) for a "Blue Alert," if all four of the following conditions are met:

- A law enforcement officer has been killed, suffers serious bodily injury, or is assaulted with a deadly weapon, and the suspect has fled the scene of the offence.
- The law enforcement agency investigating the attack has determined that the suspect poses an imminent threat to the public or other law enforcement personnel.
- A detailed description of the suspect's vehicle or license plate is available for broadcast.
- Public dissemination of available information may help avert further harm or accelerate apprehension of the suspect.

HIGHLIGHTS:

Section 8594.5 GC was added to require the CHP to activate the EAS if all of the four conditions outlined in the above summary are met. The CHP has been designated to use the federally authorized EAS for the issuance of Blue Alerts.

The activation is known as the "Blue Alert," and requires the Blue Alert response system to utilize the state-controlled Emergency Digital Information System, local digital signs, focused text, or other technologies, as appropriate, in addition to the federal EAS, if authorized and under conditions permitted by the federal government.

No later than December 31, 2011, the CHP must augment its public Internet Web site to include a Blue Alert link that would describe the Blue Alert process, objectives, and available responses.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement personnel and agencies will be required to know how to access the EAS for a Blue Alert. This new law could be instrumental in helping law enforcement personnel quickly apprehend suspects who pose an imminent threat to the public or other law enforcement personnel.

NOTES:

CASE

LAW

SUMMARIES

In re David V.

(2010) 48 Cal.4th 23

RULE: A cylindrical object grasped in the hand, even though held in such a manner as to increase the force of the resulting impact, does not meet the legal definition of "metal knuckles." Such an object must be "worn," as opposed to merely held.

FACTS: A Los Angeles Police Officer stopped 14-year-old David V. one afternoon for failing to wear a helmet while riding his bicycle. During a consensual search, the officer recovered a metal footrest from defendant's pants pocket. The hollow, cylindrical, footrest measured 4½ inches in length and a little over 1½ inches in diameter. It was made to be installed on threaded posts on each side of a bicycle's wheel hub. However, defendant's bike neither had such a threaded post nor any other type of footrest. The officer further knew from his own experience that such objects are used by gang members as metal knuckles, held in the hand to increase the force of impact from a blow to another person. Charged in Juvenile Court with possession of metal knuckles, per P.C. § 12020, the Juvenile Court judge sustained the allegation. The Second District Court of Appeal affirmed. Defendant petitioned to the California Supreme Court.

HELD: The California Supreme Court unanimously reversed, finding that the bicycle footrest at issue in this case did not meet the legal definition of metal knuckles. In reaching this conclusion, the Court considered the statutory definition of metal knuckles, as contained in P.C. § 12020(c)(7), and the legislative history leading to this definition. Specifically, metal knuckles are defined as "any device or instrument made wholly or partially of metal which is worn for purposes of offense or defense in or on the hand and which either protects the wearer's hand while striking a blow or increases the force of impact from the blow or injury to the individual receiving the blow." The operative words here are, as in italics above, "worn" and "in or on the hand." In reviewing the legislative history behind the writing of this definition, the Court found that it was not intended to include an object that is merely "held" or "grasped," in the hand. Although declining to specifically define "worn" (e.g., refusing to disapprove In re Martin Alonzo (2006) 142 Cal.App.4th 93, where it was held that a leather wallet qualified as metal knuckles when the wallet had embedded in it inch-long spikes that protruded through the fingers when it was rolled up and held in a fist), the Court did note that objects like the bike footrest in this case might be considered a "deadly weapon," per P.C. § 245, depending upon the circumstances of its use. But merely being capable of being grasped in the closed fist does not qualify it as metal knuckles.

NOTES:

People v. Lopez

(2010) 185 Cal.App.4th 1220

RULE: The required "touching" for purposes of felony child molest, per P.C. § 288(a), need not have been done by the defendant himself, and may be by the child touching herself at defendant's direction even if he is not present when the touchings occur.

FACTS: Defendant married M.L. in 1999. They each brought two daughters into the marriage. ML's daughters (defendant's step-daughters) were C.H. (born in 1990) and N.E. (born in 1992). In 2001, when C.H. and N.E. were 11 and 9 years old, respectively, defendant took camera film to Wal-Mart for developing. Among the photos were pictures of young naked girls in the shower and photos of girls blindfolded, wearing lingerie. Wal-Mart called police. An investigator took the photos to the local schools and determined that they were of C.H. and N.E. Contacting the two girls at home, they told the investigator that defendant, their step-father, had taken the photos. In talking to defendant's wife, M.L., it was verified that two of the photos were of C.H. and N.E. together, naked, in the shower. Two other photos were of C.H. blindfolded and wearing a lingerie top. C.H. later told the investigator that when those photos were taken, she and N.E. were playing what they called the "money game." The money game involved defendant blindfolding them and taking their picture while, dressed in lingerie or bathing suits, they would look for hidden coins. Defendant was interviewed and admitted to taking the photos, but didn't know why he did it. Child Protective Services interviewed C.H. and N.E. Both girls denied at that time that defendant had ever touched them inappropriately. So no charges were filed at that time. Six years later, in June, 2007, N.E. (now 15 years old) had a violent argument with defendant about some skimpy clothing she wanted to wear to school. When she got to school, she reported to a counselor that defendant had kicked her and, more importantly, had been molesting her. This led to a new investigation. A search warrant was executed on defendant's apartment resulting in the recovery of film and photos depicting C.H.'s and N.E.'s vaginal areas. Also found were a red negligee and shirt N.E. wore in some of the photos. Defendant was eventually charged with five counts of felony child molest, per P.C. § 288(a). Counts 1, 2 and 5 were based upon C.H.'s and N.E.'s testimony that defendant, at various times, had inappropriately touched them, often while masturbating himself. Counts 3 and 4 stemmed from photos of the girls playing the "money game." The testimony from C.H. and N.E. was to the effect that defendant would direct them to put on their mother's lingerie or a bathing suit. He would then take pictures of them looking for coins while they were blindfolded. This continued until shortly before N.E. reported defendant's abuse to school counselors in 2007. At trial, following the close of evidence, defendant filed a P.C. § 1118.1 motion to acquit on counts 3 and 4, arguing that there was "no evidence of concurrence between the prohibited act and lewd intent." The trial court denied the motion without comment. Defendant was convicted of two counts of simple battery (as lesser included offenses of counts 1 and 2) and three counts of felony child molest (counts 3, 4 and 5.) He appealed, arguing that the trial court should have dismissed counts 3 and 4 relating to the "money game" occurrences.

HELD: The Fourth District Court of Appeal (Div. 2) affirmed. On a motion by defendant pursuant to P.C. § 1118.1, a trial court must "order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." "The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case." In counts 3 and 4, defendant was charged with committing a lewd act upon a child under the age of 14, in violation of P.C. § 288(a). Section 288(a), as it read at the time of defendant's offenses, made it a felony when the defendant "willfully and lewdly commits any lewd or lascivious act, . . . upon or

with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . ." A violation of section 288(a) requires "'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." But the term "touching" can't be taken too literally. The defendant need not do the touching himself. Section 288(a) requires only that the defendant either touch the body of a child or willfully cause a child to touch her own body, the defendant's body, or the body of someone else. Any of these acts, when committed for a sexually exploitative purpose, is presumptively harmful and prohibited by section 288(a). The purpose of section 288 is to protect children from being sexually exploited. This cannot be accomplished unless the touching requirement is given broad application. Defendant argued, however, that there was no evidence that he was even present when the girls changed into the lingerie and bathing suits (i.e., touching themselves). Therefore, there couldn't have been the necessary concurrence of act (the girls touching themselves) and intent (defendant's lewd intent). The issue here, therefore, is whether the defendant need even be present at the time of the touching in order for there to be a crime. The Court determined that he need not be present. Whether present or not, defendant, with the requisite lewd intent, directed C.H and N.E. to change into provocative clothing. This act of changing clothing was sexually motivated by defendant's lascivious desire to observe and take pictures of the girls in that clothing while they played the money game. "Even though defendant may not have experienced sexual arousal at the moment the victims touched themselves while putting on the provocative clothing, defendant's intent when instigating or causing the touchings was lewd and lascivious within the meaning of section 288, since the touchings were sexually motivated and committed for the purpose of defendant's sexual gratification." This is sufficient to meet the requirements of P.C. § 288(a). The trial court, therefore, was correct in refusing to dismiss counts 3 and 4 and defendant was properly convicted of these offenses.

NOTE: This issue, as the Court noted, is one of "first impression," i.e., must the defendant even be present when the prohibited "touchings" occur. And it is in line with the intent of the Legislature, as interpreted by the courts, to give the section broad application. Good case, and one worth remembering, particularly for child abuse detectives investigating these types of cases.

NOTES:

Garber v. Superior Court

(2010) 184 Cal.App.4th 724

RULE: A person's trailer, even when equipped for living purposes, is not a "place of residence" when it's mobile and being used as a vehicle, and therefore does not qualify for the Penal Code exceptions to the illegal carrying of a concealed and a loaded firearm.

FACTS: Off-duty firefighter Cliff Sorensen went to Hjelte park in Los Angeles to participate in a softball game with friends and colleagues. Hjelte Park is equipped for sports and other daily activities, and not for overnight camping. Being early, and seeing no one else around, Sorensen decided to screw around a little. Driving his Jeep Wrangler into a dirt parking area, Sorensen proceeded to spin it in circles, doing "donuts" in the dirt and kicking up a virtual dust storm. Sorensen did this for about 30 to 45 seconds before parking in a paved parking space. Parked some 150 to 200 feet away at the other end of the dirt lot was a van with an attached travel trailer. Sorensen was sitting in his Jeep waiting for others to show up for the game when he noticed defendant walking over to him from the trailer. Realizing that he must have "dusted" the trailer, Sorensen held his hand up apologetically and said he was sorry. Defendant didn't respond but merely continued to walk towards Sorensen. Sorensen was attempting to apologize again when he noticed defendant was carrying a black semiautomatic pistol, holding it down to his side. When defendant continued to walk towards him "in an angry manner," getting to within 20 feet, Sorensen began to feel threatened. Believing that discretion was the better part of valour, he decided that he should leave, and drove away. When Sorensen returned a short time later as his friends were preparing to play ball, defendant's van and trailer were still there. As Sorensen got out of his Jeep, he was approached again by defendant and another person, Joseph Chervansky. Chervansky started yelling at Sorensen about kicking up dust. Sorensen again attempted to apologize but also told Chervansky that "your buddy pulled a gun." By now, others got between Sorensen and Chervansky. When the pending game's umpire heard the word "gun," he suggested that someone should call the police. Chervansky and defendant walked back to their respective vehicles. Two officers of the Los Angeles General Services Police Department (which patrols municipal sites like parks and libraries) responded, arriving some ten minutes later. Sorensen reported to them what had happened. The officers went to defendant's trailer and ordered him to come out, which he did. Defendant admitted to having a gun in his trailer and told the officers where they could find it. A loaded .380 caliber semiautomatic pistol with a four-inch barrel was recovered from a kitchen drawer in the trailer. Per the officers, defendant's trailer was hitched up to his van. Defendant was charged with three misdemeanors; brandishing a firearm (P.C. § 417(a)(2)), carrying a concealed firearm in a vehicle (P.C. § 12025(a)(1)), and carrying a loaded firearm in a public place (P.C. § 12031(a)). At trial, defendant testified that the trailer was his home. "It has a range, refrigerator. It has . . . furniture. It has a shower, a toilet. It has . . . closets and drawers, a dinette. And it's where I live." Defendant called it a "trailer coach, a travel trailer." (There was also testimony from defendant, Chervansky, and others, to the effect that Sorensen was driving dangerously when he did his donuts, that defendant never left the doorway of his trailer with the gun, and that Sorensen was also somewhat out of control, at least verbally. However, the truth or falsity of these accusations are irrelevant to the holdings below.) Defendant was acquitted of the brandishing charge but convicted of the other two. He appealed.

HELD: The Second District Court of Appeal (Div. 3) affirmed. On appeal, defendant's primary contention was that the trailer was his home and that pursuant to P.C. § 12026(a), he could lawfully possess a firearm there. Pursuant to P.C. § 12025(a), a person is guilty of carrying a concealed firearm when he or she …

(1) [c]arries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." P.C. § 12026(a) provides in pertinent part that section 12025 does not apply to a citizen or legal resident over the age of 18 who carries the concealable firearm, openly or concealed, anywhere within his "place of residence." Similarly, Section 12031(a)(1) provides that "a person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city . . . ." Section 12031(l) provides: "Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, . . ." "Defendant did not dispute that he had a concealable firearm concealed in a drawer in his trailer. He also did not dispute the fact that his firearm was loaded. His argument was that his trailer was his "place of residence," and not, under these circumstances, a "vehicle." The trial court disagreed with this argument and instructed the jury on the rules as related to vehicles. As to both counts, the jury was given the following definition of a "vehicle:" "A vehicle is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.

A trailer qualifies as a 'vehicle.'" The court refused to instruct the jury on the exceptions as described in sections 12026(a) and 12031(l) for a place of residence. Also, the trial court gave a "self-defense" instruction as to the brandishing count, but told the jury that self-defense did not apply to 12025 or 12031. Lastly, the trial court instructed the jury as follows: "A person who carries a loaded and/or concealed firearm in a vehicle on a public street or on public property is subject to prosecution under Penal Code sections 12025 and 12031 regardless of whether the vehicle has the capacity to function or does function as a 'home' or 'place of residence' when legally upon private property." Per the Appellate Court, the trial court was correct in these conclusions. In support of his argument, defendant cited People v. Marotta (1981) 128 Cal.App.3d Supp 1, where the Appellate Department of the Superior Court, in a two-to-one split decision, ruled that a cab driver's taxi was his "place of business," allowing for the carrying of a concealable, loaded firearm therein under exceptions provided for in P.C. §§ 12026(a) and 12031(h). But what might be a "place of business" does not dictate what qualifies as a "place of residence." In People v. Foley (1983) 149 Cal.App.3d Supp. 33, for instance, defendant's van did not qualify as his place of residence in that although he was sleeping in it because he'd lost his apartment, he was also using it as his means of transportation. He would merely park it behind his business and sleep there. Despite sleeping in his van, "(h)e was in fact using it as a vehicle at the time." Lastly, in People v. Wooten (1985) 168 Cal.App.3d 168, the defendant claimed that his vehicle was his place of business because as a bounty hunter who traveled a lot, his vehicle was his office. The Court disagreed, finding that his vehicle was merely his means by which he got to where he was performing his business; i.e., arresting bail jumpers. It was not as with a taxicab, which is in fact a cab driver's business. In this case, the defendant argued that he lived in his trailer full time although he would hook it up to his van and take it places such as the park. What is relevant here is that "(a)t the time of his encounter with Sorensen, he had been using his mobile home as a means of transportation: He had driven it to Hjelte park in order to take his dog for a walk." When arrested, therefore, the trailer was not defendant's "place of residence."

NOTES:

People v. Johnson

(2010) 183 Cal.App.4th 253

RULE: (1) Live and photograph lineup procedures that are not unduly suggestive are lawful. (2) A trial court may use a defendant's suppressed confession in making its evidentiary decisions. However, the defendant cannot use evidence of an uncharged criminal act to which he confessed, but where the confession was suppressed, to advance an argument of a third party's culpability. (3) Implied waivers are lawful. Referring to a *Miranda* admonishment as a "technicality" does not necessarily trivialize it to the extent where the resulting incriminatory statements will be suppressed.

FACTS: Defendants Joseph Johnson and Nicole Holmes, with the help of another individual, Corey Schroeder (not a party to this appeal), committed a series of at least five armed robberies and attempted robberies of gas station convenience stores in the Sacramento area during a two-week period in 2005. The M.O. involved Schroeder going in and casing the target prior to Johnson committing the robbery. Holmes drove the getaway car. In the final attempted robbery, Johnson shot and killed the cashier, Prem Chetty, when Chetty refused to give him any money and possibly (at least according to Johnson) attempted to disarm Johnson. Several of the robberies were recorded by surveillance cameras. After this murder, defendant Johnson told several other people that he was the one who killed Chetty. His uncle eventually convinced Johnson to turn himself into police. Following his arrest, a number of victims and other witnesses were shown photographic lineups and/or attended a live lineup. These lineups resulted in some of the victims and witnesses identifying defendant as the perpetrator. One of the victims, however, was shown a photo lineup from which he could not identify defendant. Five days later, that same victim went to the live lineup at which, after defendant was told to repeat certain phrases used by the robber, he was able to identify defendant. Defendant was the only person in the live lineup whose picture was also used in the earlier photo lineup. A second victim was asked by police officers to check out the Sacramento Sheriff's Department website where still photos taken from a surveillance tape of the Chetty homicide were posted. She did so and recognized defendant as the same man who had robbed her; a fact she reported to the police department. A week later she attended the live lineup where she "quickly" identified defendant again. These victims all later identified defendant Johnson at trial. When defendant Johnson was questioned after his arrest, he confessed. However, due to a *Miranda* violation (which was not an issue on appeal), his confession was suppressed. As a result, one of the charged robberies where Johnson's confession was the only evidence connecting him to the crime was dismissed on the People's motion. Codefendant Holmes was also arrested and questioned. Although she continually denied knowing that Johnson was committing robberies, she did admit to being present for each of the robberies, including the one where Chetty was murdered, and driving the getaway car. Johnson and Holmes, tried by different juries, were both convicted of first degree murder with special circumstances, gun allegations, and numerous counts of robbery and attempted robbery. Both were sentenced to life without parole plus piles of years to be served consecutively. Both appealed.

HELD: The Third District Court of Appeal (Sacramento) affirmed. (1) Photo and Live Lineup Procedures: As he did at trial, defendant Johnson argued on appeal that the various lineups were unduly suggestive and that as such, they tainted the later identifications by the victims and witnesses that occurred at his trial. Specifically, defendant argued that live "group lineups," as opposed to showing the suspects sequentially, are unfair. Also, defendant claimed that he stood out because he was skinnier than anyone else in the live lineup and that he was the only one with a braid protruding from one side of his hat. Lastly, defendant argued that showing witnesses either still photos from a video, or the video itself, of the defendant committing a robbery unfairly prejudiced the witnesses' later identifications of him in their

respective cases. The law on lineup procedures is well settled. It is a defendant's burden to show that the procedures used were unduly suggestive and unfair as a demonstrable reality; not just speculatively. An identification procedure is considered suggestive if it caused defendant to stand out from the others in a way that would suggest to the witness that he or she should select him. This is a 14th Amendment "due process" issue. In evaluating the procedures used, a court must consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. Factors to take into account include (a) the opportunity of the witness to view the suspect at the time of the offense, (b) the witness's degree of attention at the time of the offense, (c) the accuracy of his or her prior description of the suspect, (d) the level of certainly demonstrated at the time of the identification, and (e) the lapse of time between the offense and the identification. If a defendant fails to show that the identification procedures were unduly suggestive, the court need not address the arguments regarding the identifications' reliability under the totality of the circumstances. In this case, defendant Johnson failed to show that the identification procedures were unduly suggestive. First, there is no authority for the argument that live "group lineups," as opposed to showing each individual to the witnesses sequentially, are suggestive. Also, everyone in the five-person lineup in this case wore the same clothing, were all Black, and were of similar age, body type and complexion. Several (including defendant) had braids or dreadlocks. Defendant did not stand out in any way. Also, prior case authority has found that having defendant appear in a photo lineup and then a live lineup is not "per se" a due process violation. As for having the one victim view still photos taken from a surveillance of a similar robbery, such a procedure did not prove that that witness's later live lineup identification was prejudicial. Defendant failed to provide the Court with the surveillance photos that the victim saw, precluding the Court from determining whether there was any prejudice. Also, the Court could not say that this procedure was not necessary. Defendant, therefore, failed to carry his burden of proof on this issue. Another witness was shown the video tape of his own robbery before being shown a photographic lineup. The Court found this method of refreshing the victim's memory to be proper in that "the video surveillance camera has little serious potential to mislead." Lastly, the Court found no prejudice in the trial court allowing one victim who forgot to bring his glasses to court to approach counsel's table to get a clearer look at defendant. (2) Third Party Culpability Evidence: Defendant Johnson further complained that the trial court erroneously refused to allow him to present evidence of the dismissed robbery where the victim, in failing to identify defendant as the robber, commented that he thought the robber had a darker complexion. Defendant's cousin, with whom he lived and with whom he traded clothing, had darker skin but otherwise looked a lot like defendant. As to this robbery, the trial court had suppressed defendant's confession due to a *Miranda* violation (the details of which were not discussed), necessitating the prosecution to dismiss the case as to Johnson. The Appellate Court ruled that the trial court's ruling was correct in that it would have been dishonest and misleading (Evid .Code, § 352) for defendant to be allowed to present evidence as to a third party's (his cousin) culpability when he himself had confessed to it. It was also ruled that the trial court properly considered defendant's confession to this crime, even though it had been suppressed, in making this ruling, so long as the confession was otherwise reliable and not coerced. (3) *Miranda* Admonishment and Implied Waiver: When codefendant Natalie Holmes was interviewed by detectives, she was first read her *Miranda* rights. However, in leading into the admonishment, one of the detectives told her that they first had to "clear the technicality" of what her rights were, after which "we can talk." Secondly, Holmes argued that the admonishment was legally inadequate in that the detectives told her that her statements "may" be used against her in court, not that they "will" be used. Also, although asked if she understood her rights, she was never expressly asked whether she agreed to waive them. The detectives merely launched into their questions about the robberies. Lastly, Holmes complained that the detectives mislead her as to certain facts and pressured her into making incriminatory statements. Codefendant Holmes argued that as a result, she didn't freely and voluntarily waive her rights and that the resulting incriminatory statements she made were involuntary and should have been suppressed by the trial court. The Court disagreed. As for intimating that the *Miranda* admonishment was a mere "technicality," the Court agreed that it is improper to trivialize the legal significance of the rights she would be giving up. Commenting on the need to "clear the technicality," however, in the Court's opinion, did not minimize the significance of her rights and the risks of her speaking with the detectives. The record reflects that

Holms fully understood the severity of the situation and the seriousness of the *Miranda* rights. Further, using "may" instead of "will," when referring to the possible use of her statements against her, is also proper and not misleading. *Miranda* does not require any specific language to be used in the admonition so long as the warnings as required by *Miranda* are reasonably conveyed to the suspect. As for implied waivers, the Court ruled that so long as the circumstances indicate that, while understanding her rights, she freely and voluntarily agreed to answer questions, there is no legal requirement that her waiver be express. Here, Holmes never intimated in any way that she was reluctant to talk with the officers or that she wished to remain silent or to the assistance of counsel. As to falsely telling Holmes that her car had been caught on a surveillance video at one of the robberies, and that some of what she was telling the detectives was contradicted by Johnson, the Court noted that the fact police may have misrepresented these facts does not necessarily render an otherwise voluntary statement inadmissible. Nor does encouraging her to "tell the truth" or that "it would be better to tell the truth" make her resulting incriminatory statements involuntary. Based upon all this, the trial properly allowed Holmes' statements to be used by the prosecution at her trial. As to both defendants, therefore, their convictions were upheld.

NOTE: This is an excellent case on the use of lineups and the legal standards involved. The fairness of lineups is an issue on which law enforcement tends to bend over backwards. Sometimes law enforcement make lineups too perfect, to the point where our victims and witnesses are confronted with the impossible task of selecting the right suspect from what appears to be six cloned reproductions of the same person. While the fillers in a lineup should all be similar in appearance, the real key is to merely make sure that there is nothing significant in our suspect that cries out, "pick me, pick me!" For instance, if the robber is described by the witnesses as having an afro hair style, using five fillers who are all skin heads would be a problem. As for showing a witness a surveillance video prior to a lineup, the Ninth Circuit has previously held that there is nothing wrong with this procedure. It is a legally proper way to help "refresh" the witness's memory. (*United States v. Beck* (9th Cir. 2005) 418 F.3d 1008.) As for the individual photos obtained from the video, this new case doesn't go quite so far as to uphold a witness's viewing of these individual photos before a lineup. It merely found that because the defendant failed to provide the Court with copies of the stills from the surveillance video, the Court was unable to determine whether there was any prejudice to the defendant in this procedure. This failure of proof prevented the Court from determining whether defendant's claim that he had been prejudiced had any substance. As for Holmes' interrogation, while the court approved the "technicality" statement, be careful not to "trivializing" the *Miranda* admonishments by characterizing them as a mere "technicality." In this case, the detective's comment on this was brief and without any further elaboration, but it need not have been said at all.

NOTES:

People v. Greenwood

(2010) 189 Cal.App.4th 742

RULE: Although the fact a vehicle has an apparently valid temporary registration sticker in the window does not, by itself, usually provide reasonable suspicion to justify a stop, a stop is proper if police become aware of other information (e.g., by way of a computer check) that suggests the registration is not valid.

FACTS: Two officers were on patrol at night on May 25, 2009, when they observed defendant driving his vehicle. Defendant's vehicle had an apparently valid red temporary registration sticker in the rear window with the number "5" prominently displayed. The officers ran a registration check on the license plate and discovered that, according to DMV records, the vehicle's registration had expired two years earlier with no indication that the car was being re-registered. The officers knew that the registration sticker allowed for the vehicle to be driven until the end of the month, but erroneously believed that it could only be driven for the purpose of completing the smog check process. Doubting that defendant intended to get a smog check at eleven at night, they conducted a traffic stop. During the contact, a cigarette dipped in phencyclidine was discovered. Defendant was arrested and charged with being in possession of a controlled substance. As later disclosed during a motion to suppress, the defendant had obtained the temporary permit sticker from the DMV three weeks before his arrest and this allowed him to drive without limitation during the time period when he was stopped. At the hearing it was stipulated that the temporary permit was valid, but that the DMV records (at the time of the stop) showed the vehicle registration was suspended. The defendant's motion was denied. He pled no contest and then appealed the denial of the motion.

HELD: On appeal, the defendant argued that the stop was not objectively reasonable. The defendant contended that where a vehicle is properly displaying an apparently valid temporary permit, a stop cannot be made unless the officer has specific information the permit is invalid or fraudulent. The court agreed that "in the absence of other incriminating or ambiguous evidence, a vehicle displaying a valid temporary permit and no license plates may *not* be stopped for the purpose of investigating the permit's validity." However, should there be anything amiss, a traffic stop to check for an explanation of an otherwise unexplained inconsistency is lawful. This inconsistency is typically going to supply the necessary reasonable suspicion. In this case, based upon information from DMV that the registration hadn't been valid for two years, without any indication that the temporary permit was "part of the registration process," the officers reasonably believed that defendant's vehicle might not be legally registered. The fact that an apparently valid temporary registration sticker was visible in the window did not sufficiently explain the other information the officers had from DMV to the contrary. Under these circumstances, the officers were entitled to stop defendant and seek an explanation of this inconsistency. Also, the officers' subjective erroneous belief that defendant could only be driving lawfully in order to get a smog check does nothing to detract from the reasonable suspicion, and is irrelevant. A finding of a reasonable suspicion is based upon what a reasonable officer would have "*objectively*" believed under the circumstances; not an officer's erroneous subjective beliefs. Further, the test being what a reasonable officer would have objectively believed under the circumstances, it is also irrelevant that the permit was later determined to be valid. The traffic stop was lawful. Therefore, the resulting evidence was admissible against him, as ruled by the trial court.

People v. Dotson

(2009) 179 Cal.App.4th 1045

RULE: A vehicle displaying no license plates, even where a temporary permit is posted in the rear window, may be stopped if the officer does not *see* the temporary permit before making the vehicle stop. Failure to actively look for a temporary operating permit in the vehicle's windows before stopping the vehicle does not negate the reasonable suspicion for the stop.

FACTS: A deputy sheriff saw the defendant driving a pickup truck at about 4:00 a.m. As defendant drove towards the deputy he noticed that there was no front license plate. As the truck passed him, he could see that there was also no rear license plate. Suspecting a violation of V.C. § 5200(a), the deputy made a traffic stop. The deputy noticed that defendant appeared to be under the influence of a central nervous system stimulant, and arrested him. A firearm, ammunition, and some methamphetamine were later found in the car. Defendant filed a motion to suppress these items. During the hearing on the motion to suppress, defense counsel asked the deputy if he ever looked in the rear window of defendant's truck to see if there was a red temporary operating permit. The deputy answered that he didn't recall if he had looked, and didn't recall if there was a permit there or not. Despite this testimony, the trial court denied defendant's motion to suppress. After being convicted by a jury, defendant appealed.

HELD: On appeal, the issue was whether the deputy had the necessary reasonable suspicion to believe that defendant was driving the motor vehicle without the necessary license plates in violation of V.C. § 5200(a). The Court of Appeal ruled that there was reasonable suspicion to justify the traffic stop since the evidence showed the deputy did *not* see any license plates, and there was no evidence that he *did* see a temporary operating permit. The lack of any license plates provides the necessary reasonable suspicion to justify the traffic stop, "(u)nless there are other circumstances that dispel that suspicion and "[t]he uninvestigated chance that a temporary operating permit might be displayed somewhere on the vehicle is not such a dispelling circumstance." Thus, the trial court was correct in denying defendant's motion to suppress. The court also observed that an officer making the stop for missing plates is not required to conduct an exterior search for a temporary operating permit before making the stop.

NOTE: The holding in *Dotson* is consistent with the California Supreme Court decision in *In re Raymond C.* (2008) 45 Cal.4th 303, where it was held that an officer is not required to drive around the vehicle looking for a sticker before making a stop.

NOTES:

Crowe v. County of S.D.

(9th Cir. 2010) 608 F.3d 406

RULE: Use of a coerced confession in certain pretrial hearings triggers a Fifth Amendment violation. Coerced confessions might also be a 14th Amendment Due Process violation.

FACTS: Sometime during the night of January 20, 1998, someone entered the residence of Stephen and Cheryl Crowe in Escondido, California, and brutally stabbed to death their 12-year-old daughter, Stephanie, in her own bedroom. The murder weapon, determined to be a 5 to 6 inch knife, was not found. The subsequent investigation by detectives of the Escondido Police Department centered on Stephanie's 14-year-old brother, Michael. It eventually included as well Michael's friend, 15-year old Aaron Houser, and a third juvenile, Joshua Treadway. All three juveniles were individually interrogated at various times over the next few days. All three boys were subjected to long, exhaustive interrogations that included a number of interrogation techniques. Such techniques included falsely telling them that the police had evidence connecting them to the murders. It also included the supposed use of a "computer voice stress analyzer" which indicated when they were lying. They were also told to explain the existence of certain evidence, but that "I don't know" was not an acceptable response. Lastly, they were asked: "If you did kill Stephanie, how would you have done it." At least initially, all three boys adamantly denied any complicity in Stephanie's death. After a *Miranda* admonition and four separate interrogations, Michael eventually admitted that; "I think I did it," although he continued to claim that he really couldn't remember. After two short interrogations, Aaron was eventually arrested at school and interrogated a third time for 9½ hours. Although making some admissions, Aaron continued to maintain his innocence despite the use of the same interrogation techniques that were used with Michael. He wasn't advised of his *Miranda* rights until the end of this last interrogation. Joshua was interrogated three times, the second one lasting 13½ hours and the third another 12 hours. Joshua eventually confessed to being involved in the murder, telling detectives that Aaron had given him the knife used to kill Stephanie. A knife, fitting the description of the murder weapon, was found under Joshua's bed. Joshua's confession, however, was contradictory and inconsistent with other information the police had. He also was not advised of his *Miranda* rights until the end of the final interrogation. Incriminating statements from each of the boys were used in court at three separate pre-trial hearing; i.e., at a "*Dennis H.* hearing" (a hearing within the first 48 hours of custody to determine whether a minor should be declared a ward of the court; *In re Dennis H.* (1971) 19 Cal.App.3d 350), during grand jury proceedings, and at a W&I 707 hearing, to determine whether the boys should be tried as adults. Prior to trial in adult court, a motion to suppress was held. The trial court suppressed most of Michael's statements on the grounds that by telling him that if he confessed, he would receive treatment rather than punishment; i.e., an "offer of leniency." Aaron's and Joshua's statements were suppressed due to coercion and the lack of a timely *Miranda* admonishment. Then, on the eve of trial, traces of Stephanie's blood was forensically found on a shirt seized from a transient, Richard Tuite, who had been seen acting erratically the night of the murder in the Crowes' neighborhood, and later detained and released by the police. Charges were dismissed as to each of the boys. Tuite was later tried and convicted of voluntary manslaughter. The Crowe family sued the Escondido Police Department as well as the County of San Diego, and all those who were involved, in state court. The matter was later moved to federal court where the district court judge granted summary judgments (i.e., dismissal without trial) in favor of various civil defendants, dismissing these defendants from the suit on qualified immunity grounds. The Crowes and the Housers appealed. (Treadway did not.)

HELD: The Ninth Circuit Court of Appeals reversed in part and affirmed in part. On appeal, various issues were decided. (1) Fifth Amendment self-incrimination: Michael and Aaron argued that the interrogating

officers violated their Fifth Amendment right against self-incrimination. In response, the civil defendants noted that the U.S. Supreme Court has ruled that mere coercion does not constitute a Fifth Amendment violation absent the actual use of the coerced statements in a "criminal case." (*Chavez v. Martinez* (2003) 538 U.S. 760.) Some courts have interpreted this to mean that the statements must actually be used in trial. However, the Ninth Circuit had previously ruled that certain pretrial proceedings qualify as a part of the "criminal case." (See *Stoot v. City of Everett* (9th Cir. 2009) 582 F.3d 910.) In this case, any one of the three pretrial hearings in which the plaintiffs' statements were used (i.e., the *Dennis H.* hearing, grand jury proceedings, and W&I § 707 hearing) qualify. Further, the officers are not entitled to qualified immunity for this Fifth Amendment violation, the rule against coercive statements being clearly established. (2) Due Process: Michael and Aaron further argued that their 14th Amendment substantive "due process" (i.e., being deprived of "life, liberty or property without due process of law") were violated by the coercive interrogations. Here, the Court noted that physical violence is not required before a court may find a due process violation in a coercive interrogation. Further, the constitutionality of interrogation techniques is to be judged by a higher standard when the victim is a minor. In pretrial motions on this issue, the plaintiffs presented expert testimony to the effect that Michael's interrogation was "the most psychologically brutal interrogation and tortured confession that I have ever observed," and an "extreme form of emotional child abuse." Per the Court: "One need only read the transcripts of the boys' interrogations, or watch the videotapes to understand how thoroughly the (civil) defendants' conduct in this case 'shocks the conscience.'" Finding the interrogations to have been coercive, and in violation of the 14th Amendment due process protections, the Court further found that the civil defendants were not entitled to qualified immunity on this violation as well. The trial court's grants of summary judgment on these two issues in favor of the civil defendants were reversed, and remanded for further proceedings.

NOTE: The Court made other rulings of lesser importance, upholding some of the trial judge's rulings and reversing on others (e.g., legality of the arrests made, search warrants issued, strip searches performed, whether the Crowe family had freely and voluntarily consented to strip searches, and whether the plaintiffs were defamed). The importance of this case is the degree of pressure put on the three juvenile suspects, as well as at what point "coercion," or a *Miranda* violation, becomes a Fifth Amendment violation warranting the imposition of sanctions on the officers involved. The Ninth Circuit's *Stoot* decision found a "criminal case" to include those pretrial hearings where coerced statements have been relied upon (1) to file formal charges against the declarant, (2) to determine judicially that the prosecution may proceed, and/or (3) to determine pretrial custody status. Remember, the goal is not necessarily to obtain a confession but to determine where the truth lies.

NOTES:

In June 2011, the United States Supreme Court decided to review the Ninth Circuit's decision in Millender. Thus, the Ninth Circuit's decision is no longer the law.--

Millender v. County of Los Angeles

(9th Cir. 2010) 620 F.3d 1016

RULE: A search warrant may not include items or evidence for which there is no probable cause to believe exists or for which there is no evidence to believe is relevant to the case.

FACTS: Jerry Ray Bowen, at member of the Mona Park Crips street gang, had a "dating relationship" with Shelly Kelly. Tired of being physically abused, Kelly decided to end the relationship. She sought the help of Los Angeles County Sheriff's Department deputies to protect her as she moved her property out of the apartment the two of them shared. Bowen was not there when Kelly began removing her property. However, 20 minutes into the move the deputies received an emergency radio call. They left, telling Kelly they'd be back as soon as they handled the call. As soon as they left, Bowen came home and physically assaulted Kelly; screaming at her that he'd warned her never to call the police on him. Bowen attempted to throw her off the second story landing and then, after biting her, dragged her by her hair into the apartment. Slipping out of her shirt, Kelly managed to get away and get into her car. Bowen came after her with a "black sawed-off shotgun with a pistol grip," shooting it at her. He fired it four more times as Kelly sped off, missing every time. Detectives (defendants in this civil suit) obtained an arrest warrant for Bowen, listing his home address as 2234 E. 120th Street, in Los Angeles, which, aside from being his last known address, was actually the home of Bowen's foster mother, Augusta Millender. The detectives also sought a search warrant for that address, listing as the "property to be seized" the black sawed-off shotgun with a pistol grip described by Kelly and as shown to them in a picture she had of defendant with the gun. Also listed as property to be seized was the following: "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearms for which there is no proof of ownership. Any firearms capable of firing or chambered to fire any caliber ammunition." Also requested was any "(a)rticles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips'," then listing items that might be possessed by gang members. Also requested was evidence of dominion and control over the premises. With the help of a SWAT team, the search warrant was executed at 5:00 a.m. one morning (night service having been approved). Plaintiffs (Augusta Millender and other family members) were removed from the house while the warrant was served. Neither Bowen nor the black sawed-off shotgun were found. A letter addressed to Bowen at that address was recovered. The only firearm recovered was a lawful shotgun that belonged to Augusta Millender. Plaintiffs sued the Los Angeles Sheriff's Department and the officers involved in federal court. The civil trial judge ruled that the arrest warrant was valid and granted the civil defendant's summary judgment motion regarding the legality of the seizure of the letter with Bowen's name and address on it. But the court granted the plaintiffs' summary judgment motion as to the allegation that the search warrant was unconstitutionally overbroad, and rejecting the officers' argument that they were entitled to qualified immunity. The officers appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. At issue was the legality of including in the search warrant the request to look for and seize (1) any an all firearms and ammunition and (2) evidence of defendant's gang affiliation. As for the guns, the issue was the "specificity," or lack thereof, of the detective's request. The Fourth Amendment requires as a general rule that a searches be made with a warrant, "particularly describing the place to be searched and the persons or things to be seized." This has been interpreted as requiring search warrants to describe the property to be searched for and seized with

"specificity." "Specificity" has itself two aspects; "particularity" and "breadth." "Particularity" is the requirement that the warrant must clearly state what is sought. "Breadth" deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. In determining whether a search warrant is sufficiently specific, one of the factors to be considered is whether probable cause exists to seize the items listed in the warrant. There was no argument that there was probable cause to seize the black sawed-off shotgun with the pistol grip and any ammunition for that weapon and any documentation related to the ownership or possession of that weapon. The victim very specifically described this shotgun as the weapon used by Bowen, even showing the detectives a picture of it in Bowen's possession. But the affiant in this case went well beyond that, asking to seize any and all firearms without limitation as to what might be in the house. On this issue, the Court found that there was absolutely no evidence to indicate that any weapon other than the black sawed-off shotgun was relevant to any crimes, or even existed. On this issue, the Court conceded that warrants may sometimes authorize a search for classes of generic items, but only if the affiant is unable to describe the items more particularly in light of the information available at the time. But in this case, the officers had a detailed description, complete with a photograph, of the gun. The Court further rejected the argument that because defendant was a convicted felon, a known gang member, and a dangerous person, that the officers had the right to search for other weapons. There was simply no probable cause to support the belief that despite being a felon, a gang member, and a dangerous person, that there were any other firearms in the house. Also, whether or not finding other weapons might assist in Bowen's prosecution is irrelevant. The Fourth Amendment does not allow for "fishing expeditions" absent probable cause. As for searching for evidence of defendant's gang membership, it was agreed that this was not a gang-related case. It is not illegal to be a member of a gang. Gang membership is only relevant when the underlying criminal act is for the benefit of, at the direction of, or in association with, a group that meets the specific statutory conditions of a criminal street gang, and when the act is done with the specific intent to promote, further, or assist in any criminal conduct by gang members. While gang membership may very well be relevant to the dangerousness of attempting to search for or arrest defendant, it is not relevant to this case. As such, inclusion in the search warrant of an authorization to search for gang-related evidence was illegal. The trial court was correct in determining that as to these two aspects ([1] firearms and all calibers of ammunition, and [2] gang-related evidence), the warrant was overbroad and violated the Fourth Amendment. Also, the officers/defendants should have known this and are therefore not entitled to qualified immunity. The plaintiffs, therefore, have a valid cause of action in civil court.

NOTES:

United States v. Cha

(9th Cir. 2010) 597 F.3d 995

RULE: Seizure of a defendant's home, barring a resident from reentering while a search warrant is obtained, is lawful, but must be expedited. An unreasonably prolonged detention of the residence will result in the evidence being suppressed.

FACTS: A woman complained to the Guam police that defendant Song Ja Cha (Mrs. Cha), owner of the Blue House Lounge, was holding her passport and also held against their will two of her cousins. Officers went to the lounge to check it out. It was late Saturday evening. Upon arrival, one of the cousins was found waiting tables. The other, according to employees, was in a so-called "comfort room" where she was entertaining a customer. In checking the room, the cousin was found in the company of a gentleman whose pants were "'barely on'—unzipped, unbuttoned, and unbuckled." Upon their rescue, the cousins told the officers that they were being "prostituted against their will" and that defendant was holding their passports. They also complained that if they refused to have sex with a customer, they wouldn't be fed. The bar was closed and customers were interviewed. Afterwards, the officers asked defendant for a tour of the business and her adjoining residence. She agreed and some plain sight observations of incriminating evidence were made. Also in the residence, defendant's husband, In Han Cha (Mr. Cha; later to become a codefendant), was found asleep. He was awakened and forced to come outside. At about 1:00 a.m., Sunday morning, everyone was transported (or drove themselves) to the police station where defendant was interviewed. At about 6:00 a.m. defendant was arrested. Mr. Cha subsequently returned home at about 8 a.m., Sunday, only to find his house being guarded by a police officer who would not let him back inside even to obtain his medication (i.e., insulin; Mr. Cha, a diabetic, was later allowed to obtain his medication and glucose monitor with a police escort.). So he called his lawyer and waited outside. Meanwhile, the officers were finishing up their reports in preparation for obtaining a search warrant for the lounge and the Chas' residence. At about 9:20 a.m., Sunday, another officer was called and told to come to the office for a noon briefing, after which he was to prepare a search warrant. Work on the warrant application, however, did not begin until 6:30 p.m., and was not finished until 4 a.m., Monday morning. At 7:50 a.m., the officer took the warrant for review by a prosecutor. An available magistrate to review and sign the warrant couldn't be found until 10:25 a.m., Monday. The warrant was finally executed beginning at 2 p.m., Monday, and not finished until 1 a.m., Tuesday morning, when Mr. Cha was finally allowed to reenter his home. The total time during which the Cha residence was detained was determined to be almost 26½ hours (i.e., from 8:00 a.m., Sunday, to 10:15 a.m., Monday). With both defendant and Mr. Cha charged in federal court with sex trafficking, conspiracy and coercion, they brought a motion to suppress the evidence recovered from their home. The district court judge found the length of the detention of the Chas' residence to be unconstitutionally excessive and granted the motion. The Government appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. It was agreed that the officers had sufficient probable cause to seize the Blue House Lounge and defendant's home and detain both for a reasonable time while a search warrant was obtained. The issue here is whether the 26½ hours between when Mr. Cha was first refused admittance into his home until a magistrate finally signed the search warrant was unreasonably prolonged. The trial court held that it was, and the Ninth Circuit agreed. In determining what is reasonable, a court must balance the privacy-related concerns of the resident with the law enforcement-related concerns, considering four factors: (1) Whether the police had probable cause to believe that the defendant's residence contained evidence of a crime or contraband; (2) whether the police had good cause to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police made reasonable efforts to reconcile their law

enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time; i.e., whether the time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. Although the first factor favored the Government, in that the Guan police had probable cause, the next three favored the Chas. Specifically, the Court upheld the trial court's determination that there was no "good reason" to fear that Mr. Cha would destroy evidence. And defendant, Mrs. Cha, was in custody. Next, delaying Mr. Cha's reentry into his home to retrieve his medicine, even if escorted, didn't show an effort to reconcile the officers' needs with the Chas' privacy rights. And lastly, the police made little if any effort to expedite the obtaining of a search warrant, unnecessarily delaying the process for an unreasonable 26½ hours. The Court further considered whether the officers' good faith precluded the use of the Exclusionary Rule, as explained in the U.S. Supreme Court's decision of *Herring v. United States* (2009) 555 U.S. 135. In *Herring*, the High Court told us that unless the officers' illegal actions were deliberate, reckless, or grossly negligent, or the product of recurring or systemic negligence, then the resulting evidence may not be excluded. Evidence should only be excluded where the police conduct is sufficiently deliberate that exclusion can meaningfully deter it, and where the officers' actions are sufficiently culpable that such deterrence is worth the price paid by the justice system when it suppresses relevant evidence. The Court here found *Herring* inapplicable in that the officers' actions were deliberate, culpable and systemic. Specifically, the Court held that the officers, who proceeded with a "nonchalant attitude" and in a "relaxed fashion," should have known that the law requires that they act with due diligence, expediting the process and minimizing the time the defendant's residence was put off limits to its occupants. This "mistake of law" (as opposed to a simple "mistake of fact") cannot be excused by the officers' good faith. The resulting evidence, therefore, was properly suppressed.

NOTES:

People v. Robinson

(2010) 47 Cal.4th 1104

RULE: Arrest warrants describing the suspect by his DNA, when his identity is otherwise unknown, are lawful. A good faith violation of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.), by collecting a sample from a prisoner who does not qualify for inclusion in the DNA database, does not necessarily require suppression of the result.

FACTS: Deborah L. was sexually assaulted (i.e., rape, rape by foreign object, oral copulation) at knife-point in her own bedroom in 1994. The assailant left semen on the victim and at the scene. The assault was reported immediately to the police and a standard "rape kit" was prepared, but the crime went unsolved for years. Six years later, the preserved semen was used to generate a genetic profile of the unknown male suspect, determined by the presence or absence of markers at 13 distinct DNA loci. Four days before the six-year statute of limitations (P.C. § 800) was to expire, a felony complaint was filed in this case against "John Doe, unknown male," describing him by his 13-loci DNA profile. A trial court found probable cause in the complaint and an arrest warrant was issued for "John Doe," incorporating by reference that DNA profile. It was noted that this particular genetic profile was unique to the point where it would occur in approximately one in 21 sextillion of the Caucasian population, one in 650 quadrillion of the African American population, or one in 420 sextillion of the Hispanic population. The issuance of this arrest warrant served to toll the statute of limitations (i.e., it stopped it from expiring; see P.C. § 804(d)). After the statute of limitations would have run except for the issuance of the arrest warrant, a criminalist searching the state's DNA database, made a "cold hit" match between the 13-loci DNA profile in the John Doe arrest warrant and defendant's DNA, as determined in by a blood test collected from him in March, 1999. The DNA sample was collected from defendant pursuant to the newly enacted DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.). Pursuant to this act, as originally enacted (having been amended since then), any person convicted of a crime as specified by the Act (i.e., a "qualifying offense") was required to provide, among other samples and impressions, two specimens of blood. (Former P.C. § 296(a)(1)) Defendant, having just been convicted of two non-qualifying misdemeanors, and scheduled to return to prison for a parole violation, was mistakenly believed to have had a qualifying prior conviction. As a result, he was required to provide two blood samples. Defendant's DNA samples were added to California's DNA data bank. Based upon the matching of this mistakenly collected DNA sample with the DNA left at the scene of the assault on Deborah L, an amended arrest warrant with defendant's real name was issued and executed by arresting him. Defendant was thereafter charged with the 1994 sexual assault of Deborah L. He filed a motion to suppress his 1999 blood samples and the resulting DNA test evidence. His motion was denied and he was tried and convicted. Sentenced to 65 years in prison, he appealed.

HELD: The California Supreme Court, in a 5-to-2 decision, affirmed. Among the arguments raised by defendant on appeal was that the taking of blood samples from him pursuant to authority of the DNA and Forensic Identification Data Base and Data Bank Act of 1998, when he did not have any of the necessary qualifying prior convictions to make him subject to the Act, constituted a Fourth Amendment violation. Per defendant, his blood test results and the matching of his DNA to the crime scene should have been suppressed. The Court disagreed on two grounds. First, the mistaken collection of a blood sample from defendant, under the circumstances, was not a Fourth Amendment violation. Although nonconsensual blood extractions are searches entitled to Fourth Amendment protection, whether or not they violate the Constitution depends upon whether the search in question is reasonable under the circumstances. Blood tests are commonplace today. And defendant, as a convict, had a reduced expectation of privacy. As

such, defendant did not have a Fourth Amendment constitutional right to prevent state authorities from collecting a blood sample even thought it was taken in violation of a state statute as it existed at the time. Secondly, even if it were a Fourth Amendment violation, the rule today is that a constitutional violation does not always require the suppression of evidence. The Exclusionary Rule applies only "where its deterrence benefits outweighs its 'substantial social costs.'" The extreme sanction of suppressing evidence should be used only when the government's illegal acts are deliberate, reckless, or grossly negligent, or in some circumstances, involves recurring or systematic negligence. In this case, evidence was presented to the effect that the government officials who mistakenly collected defendant's blood samples were trying their best to correctly and effectively implement a new and confusing set of statutes. Safeguards were set up to prevent the mistaken collection of blood samples and/or their inclusion in the DNA data base. In defendant's case, his prior criminal history was merely misinterpreted by those tasked with enforcing the new statutes. There was no deliberate, reckless or grossly negligent acts on their part, nor was it shown that the problem is recurring or a part of some systematic negligence. As such, use of the Exclusionary Rule is not called for in this case. Therefore, defendant's DNA was properly used by the trial court to connect him to the sexual assault of Deborah L. Defendant, however, also challenged the legality of using one's DNA profile in an arrest warrant for the admitted purpose of stopping the running of the statute of limitations on his crimes. Specifically, defendant argued that using nothing more than a DNA profile fails to satisfy the "particularity" requirement of the Fourth Amendment. An arrest warrant may only issue upon the magistrate being satisfied that an offense has been committed and that there is reasonable grounds to believe that the defendant has committed it. (P.C. § 813(a)) Further, an arrest warrant "shall specify the name of the defendant or, if it is unknown, . . . the defendant may be designated therein by any name." (P.C. § 815) Elsewhere it is provided that a "fictitious name" may be used if his true name is unknown. (P.C. § 959) And, of course, the Fourth Amendment requires that no warrants may issue except upon probable cause, "particularly describing . . . the persons to be seized." In other words, there has to be some "meaningful restriction" upon who may be seized under the authority of the warrant. Here, the warrant was initially issued in the name of "John Doe," as allowed for under the above statutes. To meet the "particularity" requirement, defendant's DNA profile was specifically listed. There was no more particular, accurate, or reliable means of identification of the suspect at the time the warrant was issued. And in fact, use of the DNA profile, given the uniqueness of one's DNA, is far more precise than using a person's physical description or even his name. Further, the use of a fictitious name and description is further authorized by California statutes (see P.C. §§ 959, 960.) And, per P.C. 804(d), the issuance of an arrest warrant that meets the requirements of these statutes is enough to stop the running of the statute of limitations. For purposes of the Fourth Amendment, therefore, use of a DNA profile in an arrest warrant, at least until the suspect is identified, is lawful. Lastly, the Court found that such a DNA arrest warrant does not violated defendant's "due process" rights.

NOTE: This decision is consistent with what little other case law is out there, as least on the issue of whether John Doe/DNA profile arrest warrants are lawful. (See *State of Wisconsin v. Dabney* (Wis. App. 2003) 663 N.W.2d 366.) But on the issue of whether it is a Fourth Amendment violation to seize a DNA sample from a prisoner without an authorizing statute or a warrant, the Ninth Circuit disagrees. (See *Friedman v. Boucher* (9th Cir. 2009) 580 F.3d 847.) In *Boucher*, however, the suspect was a pre-trial detainee while defendant here was a sentenced convict with a seriously diminished expectation of privacy. But either way, don't use this case to ignore the dictates of the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.) when collecting DNA samples and submitting them for inclusion in the data base. Whether or not violating the Act is a Fourth Amendment issue, officers always have a professional and ethical duty to follow the statutory law whenever possible.

NOTES:

U.S. v. Vongxay

(9th Cir. 2010) 594 F.3d 1111

RULE: A consent to being searched must be freely and voluntarily obtained, but may also be implied under the circumstances.

FACTS: Officer Alfred Campos of the Fresno Police Department was working near the "After Dark Nightclub" one evening in a marked patrol car. The area is a known venue for gang activity and violence. Officer Campos observed a group of Asian males loitering in front of the club. They were dressed in blue athletic apparel (i.e., L.A. Dodger clothing) commonly worn by members of the Asian Crips and the Tiny Rascals street gangs. Officer Campos knew that the club was a hangout for both gangs and that they didn't get along, engaging in "constant shootings at each other" and causing other disturbances. When the group noticed Office Campos approaching, they began to retreat out of the parking lot and funnel into the club. After calling for backup, Campos drove around the block and re-approached the club on foot. By this time, the same group of males had once again gathered outside the club. Officer Campos approached the nearest person, defendant in this case. Campos engaged defendant in a conversation and asked him if he was leaving, or if he was going to go back into the nightclub. During this conversation, Campos noticed that defendant was attempting to conceal something under his waistband. He "turned his body to the left and kept his waist area away from [Campos] . . . [a]nd . . . he placed his left hand down towards his waist area as if he was covering something." Thinking that defendant might be armed, Campos positioned himself behind defendant and asked him if he had any weapons. Defendant said that he did not. Campos then asked for permission to search him for weapons. Defendant did not verbally respond, but instead "placed his hands on his head." Campos began the search by feeling defendant's waistband and immediately felt the frame of a large handgun. As soon as Campos felt the gun, defendant attempted to pull away. A struggle ensued during which a loaded semiautomatic handgun fell from defendant's waistband. Defendant continued to struggle. With the help of other officers, he was taken to the ground, Tasered, and arrested. With a felony record, defendant was charged in federal court with being a felon in possession of a firearm (18 U.S.C. § 922(g)(1)). He filed a motion to suppress the gun as the product of an illegal search. (He also filed a motion to dismiss, arguing that section 922(g)(1) violated his Second Amendment right to bear arms as well as his Fifth Amendment due process right to equal protection.) The trial court denied defendant's motions. After his conviction by a jury, defendant appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. Defendant argued on appeal that he was illegally patted down for weapons. The Government noted in response that the officer could lawfully ask for a consent to search and, upon receiving such consent and so long as the consent was not coerced, a pat him down for weapons is lawful. The Government has the burden of proving consent and that the consent was freely and voluntarily given. Whether or not the consent was valid is a question of fact and must be determined from all the surrounding circumstances. A court is to consider five factors in determining whether consent was voluntarily given; i.e., (1) whether the defendant was in custody at the time, (2) whether the arresting officer had his gun drawn, (3) whether *Miranda* warnings were given, (4) whether the defendant was notified that he had a right not to consent, and (5) whether the defendant had been told that a search warrant could be obtained. All five factors need not be satisfied in order to sustain a consensual search. In this case, defendant was not in custody and the officer did not have his gun drawn or even exposed. *Miranda* is inapplicable because defendant was not yet under arrest. And there were no threats to get a search warrant. So the only factor not satisfied was that defendant was never told that he had a right not to consent. But there is no legal requirement that a suspect be so-informed. It is but one factor to consider. Balancing these factors, therefore, the Court found defendant's consent to be valid. Of

significance is that Officer Campos asked defendant if he could search him, thus giving him a choice. Officer Campos's conduct would not have "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." In this case, defendant never verbally consented, but rather put his hands on his head. Defendant argued that this gesture was actually his submission to an illegal arrest and not the giving of consent to be searched. But the Court found the lifting of the arms as a gesture so as to enable a search in response to Campos's request for permission; i.e., "implied consent." Therefore, defendant's motion to suppress the gun was properly denied.

NOTE: For implied consent to search to be valid, an officer's interpretation of the defendant's actions (e.g., putting his hands on his head in this case) is a reasonable interpretation. For instance, had defendant in this case raised one arm for the purpose of displaying the middle finger of that hand, it would have been hard to argue that the defendant was consenting to being patted down. The Court further held, by the way, that the Second Amendment right to bear arms did not confer on defendant a constitutional right to gun possession. The United States Supreme Court's ruling on the Second Amendment and firearm possession, *District of Columbia v. Heller* (2008) 554 U.S. 570, did not prohibit all restrictions on the ownership or possession of firearms. It is still constitutional for a legislature to prohibit felons, for instance, from gun ownership or possession. Further, such restrictions do not violate a felon's equal protection rights under the Fifth or Fourteenth Amendments.

NOTES:

In re D.C.

(2010) 188 Cal.App.4th 978

RULE: The warrantless entry of a residence and search of a minor's bedroom over the minor's objection is lawful when the minor's parent gives consent, at least in the absence of evidence suggesting that the parent has abdicated his or her authority over the minor.

FACTS: Officers of the Oakland Housing Authority were called to an apartment building to check on a report of possible narcotics activity. Upon arrival, the officers contacted and detained defendant's adult brother. While checking out the brother, they discovered that he was on probation, with a search clause. At the same time, a neighbor complained to the officers that his apartment had just been burglarized. While escorting the brother to his apartment where he lived with his mother and 15-year-old defendant, they ran into mom. They told her they wanted to do a probation search of her apartment. She consented in writing to the search of "the whole interior of my apartment #2." Defendant, however, was standing at the door and told the officers; "You're not going to enter the apartment." Defendant's mother told defendant to "get out of the way." Defendant immediately complied. The officers entered and searched the entire apartment including its three bedrooms. In defendant's bedroom they found some of the items reportedly taken in the burglary. A petition was filed in Juvenile Court alleging that defendant was in possession of stolen property, per P.C. § 496 (as well as having previously threatened a witness; P.C. § 140). His motion to suppress the evidence found in his bedroom was denied and the petition was sustained. Defendant appealed.

HELD: The First District Court of Appeal affirmed. Defendant's argument on appeal was that the evidence found in his room should have been suppressed because it was the product of a warrantless search done over his objection. A voluntary consent to search has always been recognized as a valid exception to the general rule that a search warrant is needed to enter and search a residence. Such consent can come from either the person whose property is searched or from a third person who possesses common authority over the premises. "Common authority" exists where there is a "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." It is also a rule that "officers may rely on the consent of a person whom they reasonably and in good faith believe has authority to consent to a particular search," sometimes referred to as "apparent authority." Defendant argued that there was no evidence supporting the argument that his mother had such "apparent authority" over his bedroom. With adults, living in separate bedrooms, it is presumed that a person does not have the authority to allow police officers into another's bedroom, absent evidence to the contrary. But with the adult child of an occupant, "absent circumstances establishing the son has been given exclusive control over the bedroom," it is presumed that the parents have retained the authority to enter the room and may therefore grant others access to it as well. With a minor child, this argument is even stronger. Parents have any number of legal obligations to their children, including that of "reasonable care, supervision, protection and control" over the minor. Recognizing this, the Court held that a parent's "common authority over the child's bedroom is inherent." Parents have to have access to their child's bedroom, and the authority to consent to the search of the bedroom, in order to properly execute their duty of supervision and control over the child. "In the absence of evidence suggesting a parent has abdicated this role toward his or her child, police officers may reasonably conclude that a parent can validly consent to the search of a minor child's bedroom." In this case, it was apparent that mom remained in control, given defendant's immediate cessation of his resistance to the officers when she told him to "get out of the way." The Court further rejected defendant's argument that *Georgia v. Randolph* (2006) 547 U.S. 103, requires the officers to honor

his objection to their entry. In *Randolph*, the U.S. Supreme Court ruled that when two co-occupants are present, and one objects to entry into a residence by the police, the officers may not rely upon the consent of the other to justify a warrantless entry. *Randolph*, however, deals with adult co-occupants having equal authority over the premises. It does not dictate a new rule for when a minor and his or her parents disagree. The officers' reliance on defendant's mother's consent to enter and search, even over defendant's objection, was lawful.

NOTES:

Michigan v. Fisher

(2009) __ U.S. __ [130 S.Ct. 546; 175 L.Ed.2d 410]

RULE: The "Emergency Aid" exception to the search warrant requirement allows for a warrantless entry into to a residence when an officer has an objectively reasonable basis for believing that a person within the house is in need of immediate aid.

FACTS: Officer Christopher Goolsby and his partner responded to a complaint of a disturbance at a particular residence in Brownstown, Michigan. A couple directed the responding officers to defendant's house where defendant was "going crazy." In the driveway was a pickup truck with the front "smashed." The fence posts along the side of the property were damaged. Three of the house's windows were broken out with the glass on the ground. The officers found blood on the front of the pickup, on clothes in the pickup, and on one of the doors to the house. Defendant could be seen through a window, inside the house, screaming and throwing things. The back door was locked and a couch was pushed up against the front door. The officers knocked, but defendant refused to answer. They could see, however, that he had a small cut on his hand. Defendant ignored the officers' questions to him about whether he needed medical attention, instead demanding – in a response laced with profanity – that the officers go and get a search warrant. Officer Goolsby opened the front door part way and pushed his way in until he could see defendant pointing a rifle at him. Defendant was subsequently subdued and taken into custody. Charged in state court with assault with a dangerous weapon and possession of a firearm during the commission of a felony, the trial court ruled that Officer Goolsby had made an illegal entry, violating the Fourth Amendment. All the products of that entry, including the officer's observations of defendant pointing a rifle at him, were therefore suppressed. This ruling was upheld on appeal through the state court system. The United States Supreme Court granted certiorari.

HELD: The United States Supreme Court, in a 7-to-2 decision, reversed. Noting that "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" the Court found that the officers in this case acted reasonably under the circumstances presented to them. While warrantless residential entries are presumptively unreasonable, "the exigencies of the situation" may provide an exception. "The need to assist persons who are seriously injured or threatened with such injury" is one such exigency. (*Brigham City v. Stuart* (2006) 547 U.S. 398.) Law enforcement officers may make a warrantless entry into a residence "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The officers' subjective intent is irrelevant, as is the seriousness of the crime they are investigating when the exigency arises. It is also unnecessary that the officers have "ironclad proof of 'a likely serious, life-threatening' injury." All that is required is that there be "an objectively reasonable basis for believing . . . a person within [the house] is in need of immediate aid." Pursuant to this "emergency aid" exception to the search warrant requirement, the officers here found a "tumultuous situation" in the house, signs of a recent injury (whether minimal or not), and violent behavior occurring in their immediate presence; so it was reasonable for the officers to conclude that defendant's actions might have a human target (a spouse or a child), or that he would further hurt himself in the course of his rage. Under these circumstances, it was reasonable for Officer Goolsby to make a warrantless entry in order to defuse the situation before it became any worse. Defendant questioned, however, whether the officers really intended to render him aid when they entered. In response, the Court reiterated that the officers' subjective intent is irrelevant. It need only be shown that there was "an objectively reasonable basis for believing that medical assistance was needed," or that "persons were in danger." (Italics added.) The entry of defendant's residence, therefore, was lawful.

NOTES:

People v. Hochstraser

(2009) 178 Cal.App.4th 883

RULE: (1) Warrantless entry into a residence to check the welfare of a missing person is justified when a police officer would reasonably believe, under the totality of the circumstances, the she may be inside either injured or in need of assistance. (2) Plain sight observations made while lawfully inside the residence can be used to establish probable cause. (3) With probable cause, the warrantless search of a vehicle parked in a carport at the apartment building is lawful.

FACTS: On June 5, 2005, Christine Gonzales called the Santa Clara Police Department from Sacramento, asking them to check on the welfare of her mother. Gonzales's grandmother had called her earlier to tell her that her mother (the grandmother's daughter) had been involved in a domestic violence incident the night before with her live-in boyfriend, defendant, and that he struck her during a physical fight. Since then, the grandmother had been unsuccessful in her attempts to get a hold of her. Defendant was apparently alone in their apartment with their two-year old son, Daniel. Gonzales and her grandmother had no idea where she could have gone and knew only that no one had heard from her. Gonzales asked the police dispatcher if they would go check on her and her son. Santa Clara Officer Liepelt arrived at the apartment at about 10:05 p.m. At that point, he knew only that they were to check on the welfare of a child and that the reporting party could not reach the child's mother. The child was supposed to be at that address with his father. It was also known that the mother had been involved in a domestic violence incident with the father of the child the evening before. The officers found the apartment completely dark. The door was locked and the blinds were shut. One window off the front patio, however, was open approximately an inch. There was no sound coming from the apartment and no one responded to repeated attempts to get their attention by knocking on the door and windows. Officer Liepelt called Christine Gonzales from his cell phone. She explained to him in greater detail about her efforts to get a hold of her mother all day via the apartment phone and her cell phone. She said her mother, Dolores Gonzales, always had her cell phone with her "so it was very suspicious that she could not reach her mom either at the apartment or on her cell phone." She said defendant and Dolores shared one car and that she had no other means of transportation. Gonzales said that she was concerned about her mother and two-year old son, Daniel. She was about two hours away with a key but wanted the officers to continue their welfare check to see if anyone was in the apartment. This information heightened Officer Liepelt's concerns, particularly in light of the recent domestic violence incident. He also knew that domestic violence in Santa Clara often resulted in homicides. He was concerned that someone might be in the apartment "injured or hurt" and unable to respond. He knew he couldn't leave the scene without checking inside. He called his supervisor, Sgt. Brauer, who responded to the scene. After being informed of what was going on, Sgt.Brauer approved Officer Liepelt's plan to enter the apartment through the partially open window. It was never an option to wait until Gonzales arrived. Officer Liepelt made entry through the window and opened the door for other officers to come in. They verbally identified themselves as police officers, but still got no response. The completely-dark apartment was then checked room by room until getting to the last bedroom. In that bedroom they found defendant sitting on the bed, in the dark, bed sheets on the floor, with earphones in his ears. He seemed surprised to see the officers. The room had a cold breeze blowing through from an open window. The officers told defendant why they were there and asked where Dolores was. Defendant said simply that she was not home. He said that they had had an argument the night before during which they'd pushed each other. Dolores had suffered a cut on her chin from a fall. Defendant had redness on his face and several cuts on his hands which he said were from the fight. According to defendant, Dolores left early that morning and he hadn't been able to reach her since. Defendant took Daniel to his mother's in San Francisco and left him there. He left his car there and took his mother's Volkswagen Jetta. According to

Officer Liepelt, defendant's demeanor was withdrawn, emotionless, and unconcerned about Dolores's safety or welfare. Sgt. Brauer described defendant's affect as "spacey." Another officer, Earl Amos, arrived at the scene and was told what was going on. He started looking around to see what might be in plain view. He noted the smell of fresh bleach or cleanser and paint, which was at odds with the unkempt condition of the apartment. He also noticed three or four Sawzall (a handheld reciprocal saw) blades sitting on the arm of the couch. One was used, as indicated by the fact that the painted area in the middle of the blade was all worn off. The others had no such wear. Sgt. Brauer noticed more blades on the kitchen table. The bathroom was clean and smelled very strongly of bleach. In the kitchen, Officer Amos located a small fanny pack in plain view on a kitchen table. The zipper along the top was partially open and Officer Amos could see inside it a wallet of the type commonly used by females. Shining his flashlight inside the fanny pack, Officer Amos could also see a female's driver's license photo. He removed the wallet without unzipping the pack and determined that the driver's license belonged to Dolores. The fanny pack also contained a cell phone, keys, ATM and credit cards, and some other personal items. He communicated this information to Sgt. Brauer. When asked why Dolores would have left without her ID or other belongings, defendant, with a "blank stare," didn't have an answer. Asked for permission to search his Jetta, defendant declined. The officers decided to search it anyway. The Jetta was parked in a carport near defendant's apartment. Officer Amos looked into the Jetta from the outside and saw a tarp on the floor and several 18x20x30 inch Rubbermaid containers stacked on the rear seat and another in the front. Thinking of another case the officer had been involved in a year earlier where a dead woman had been found in a Tupperware bin in a car, and considering all the suspicious circumstances of this case, the officer decided (at Sgt. Brauer's instruction) to enter the car and check the bins. In the first bin was a garbage bag. Looking into the bag, Officer Amos found "a mound of human flesh." Sgt. Brauer verified what appeared to be the human flesh of an adult. The search was ended and defendant was arrested. The body, of course, was Delores. Two-year-old Daniel was found to be safe in San Francisco with defendant's mother. Charged with first degree murder, defendant filed a motion to suppress all the evidence found in his apartment and the Jetta. The trial court denied the motion and defendant was convicted following a jury trial. Defendant appealed.

HELD: The Sixth District Court of Appeal (Monterey County) affirmed defendant's conviction. At issue on appeal was (1) the warrantless entry into defendant's apartment, (2) the length of time the officers remained in the apartment, and (3) the warrantless search of the Jetta. (1) Entry into the Apartment: The trial court had held that the "exigent circumstances" exception to the search warrant requirement did not justify the warrantless entry into defendant's apartment. However, while this case was pending, the California Supreme Court decided People v. Rogers (2009) 46 Cal.4th 1146, where the warrantless search of storage rooms at defendant's apartment complex was upheld under very similar circumstances. The exigent circumstance in this case was the urgent need to locate Dolores and Daniel and verify their well-being. "Warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." The need to protect or preserve life is one of the exigencies that provide an exception to the warrant requirement of the Fourth Amendment. "(L)aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." The test is an objective one. So long as the entry is reasonable under the Fourth Amendment, an officer's subjective reasoning is irrelevant. Reasonableness is determined by looking at the totality of the circumstances. In doing so, it is not necessary that there be any obvious indications of foul play. The key in this case, as analyzed by the Appellate Court, was the fact of a reliable missing person report made under circumstances known to the investigating officers to strongly suggest that the missing person was injured or worse, this information being sufficient, under the totality of the circumstances (as detailed above), to cause a reasonably cautious person to believe that the action taken was appropriate. The entry to check on the welfare of Delores and Daniel was lawful. (2) Length of Time Spent Investigating in the Apartment: This argument by the defendant presupposes that the officers' entry into his apartment was justified under the officers' "community caretaking function," as held by the trial court. Indeed, "[a]ny intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives." However, the Appellate Court found the entry justified under

the "exigency exception" to the search warrant requirement instead, which is not subject to any such limitations. "On the contrary, '[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' [Citation.] And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." However, defendant still contended that once the officers determined that Delores and Daniel were not in the apartment, they were obligated to cease their investigation and leave. The Court disagreed. While lawfully there, the officers made certain plain sight observations related to their continuing concerns over the welfare of the victim and her son. The place smelled like cleaners; i.e., "a 'chloriney' smell reminiscent of a crime scene cleanup." The Sawzall with it's used blade. The victim's fanny pack. And defendant's strange demeanor. Based upon these and other plain sight observations as described above, the Court found that "it would have constituted a dereliction of duty for [the police] to turn around and abandon [their] investigation of Dolores's and Daniel's whereabouts and welfare." (3) The Warrantless Search of the Jetta: The Court found that the evidence discovered by the police in plain view following their entry into the apartment supplied ample probable cause to search the car for evidence of a crime. Per the U.S. Supreme Court: "If there is probable cause to believe a vehicle contains evidence of criminal activity*, United States v. Ross*, 456 U.S. 798, 820-821 . . . (1982) authorizes a search of any area of the vehicle in which the evidence might be found." (Citing *Arizona v. Gant* (2009) __ U.S. ___ [129 S.Ct. 1710; 173 L.Ed.2d 485.) Defendant, however, argued that because the Jetta was parked at or near defendant's apartment in a carport, the officers were obligated to obtain a search warrant first. According to defendant's reasoning, when a vehicle is not being used on the highways, but rather found stationary at a place regularly used for residential purposes, like an apartment building's carport, the automobile exception does not come into play. The Court again disagreed. In so doing it discussed what is known as the "twin justifications" for not requiring search warrants to search vehicles; i.e., "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility." The Court found these justifications to apply as well when the vehicle is parked in one's carport attached to his apartment. The automobile exception to the warrant requirement was fully applicable to the car in which Dolores's dismembered body was found. The evidence found in defendant's apartment as well as in the Jetta, therefore, was properly admitted into evidence against him.

NOTE: A great example of what a police officer can accomplish in establishing justification for a finding of exigent circumstances and probable cause by merely taking his time, marshalling all the information he can under the circumstances, involving a supervisor's approval, and then doing what he knows in his (or her) gut is the right thing to do. In these circumstances, a reasonable officer just wouldn't feel comfortable walking away from the scene without checking on the victim's welfare.

NOTES:

United States v. Maddox

(9th Cir. 2010) 614 F.3d 1046

RULE: (1) Search of a container in defendant's possession while being arrested, but separated from his person and then not searched until after the defendant is secured, is not a valid "search incident to arrest" and is unlawful. (2) An inventory search of a vehicle is unlawful unless it is stolen, used in a felony, or the officer's "community caretaking function" applies.

FACTS: Officer Scott Bonney of the Washington State Police, parked by the side of the road writing reports, observed defendant's Chevrolet truck come to an abrupt stop in the middle of an intersection. Defendant immediately proceeded in reverse back towards the stop sign, narrowly missing another car crossing the intersection, and then made a "three-point turn," blocking traffic as he turned around. He then accelerated rapidly out of the intersection. Officer Bonney gave chase and made a traffic stop a short distance away. As Officer Bonney exited his vehicle, defendant got out of his vehicle as well, yelling at the officer. Officer Bonney told defendant to get back into his truck and be still, which he did. Defendant was told that he was stopped for driving recklessly. During the ensuing conversation, it was determined that defendant did not have a driver's license and that he had been given the truck by a friend but had not yet registered it and didn't have a bill of sale for it. Officer Bonnie further noted that the registration sticker was expired and that a temporary registration sticker in the window was not only a photocopy, but that it was purportedly valid for longer than is normal for a temporary sticker (i.e., 31 instead of 30 days). A computer check revealed that defendant's driver's license had been suspended. Defendant was asked to step out of the truck, but he refused. Officer Bonney took defendant's car keys and a cell phone from his hand, tossing them onto the truck's seat, and then, arresting him, extracted him from the truck and handcuffed him. After searching defendant and finding $358 in cash in his pants pocket, defendant was put into the back seat of the patrol car. Officer Bonney then returned to defendant's truck and recovered the cell phone and car keys from the vehicle's seat. Hanging on the key chain was a small metal vile which, when opened, was found to contain a small amount of methamphetamine. A laptop computer bag was also found in the truck. Opening the bag, the officer found a handgun and more methamphetamine. Charged in federal court, defendant filed a motion to suppress the evidence found in his truck. The district (trial) court granted his motion. The Government appealed.

HELD: The Ninth Circuit Court of Appeals, in a split, two-to-one decision, affirmed. (1) The Government argued that the search of the metal vial on defendant's key chain was lawful as a search incident to his arrest. A "search incident to arrest" is one of the "few specifically established and well-delineated exceptions to the warrant requirement of the Fourth Amendment." The rationale for allowing such a search is "for the twin purposes of finding weapons the arrestee might use, or evidence the arrestee might conceal or destroy." In determining the validity of a search incident to arrest, two factors must be considered: (1) Was the container searched "within the arrestee's immediate control when he was arrested," and (2) did events occurring after the arrest but before the search make the search unreasonable? In this case, while the key chain vial was under defendant's immediate control when he was arrested (as he was being extracted from his truck), subsequent events—being handcuffed and put into a patrol car—rendered the later search unreasonable. More to the point, when defendant was searched, there was no longer any possibility that he could have reached for it and concealed or destroyed evidence. "Temporal or spatial proximity" between the arrest and the search isn't enough to justify the search unless there is some threat or exigency to justify the delay. Here, there was none. Therefore, the "search incident to arrest" exception to the Fourth Amendment didn't apply. (2) If the search of the vial was illegal after defendant had been secured, then certainly the search of the laptop computer bag was as well. However, the Government

sought to justify the search of defendant's laptop computer bag as an inventory search. Impounding and inventorying its contents is lawful under limited circumstances. For instance, if stolen or used in the commission of a felony, neither of which applied here, the car may be impounded and searched. Also, under an officer's "community caretaking function," the officer may impound a vehicle after a violation of one or more of the traffic offenses for which the legislature has specifically authorized impoundment, but only as long as one of the following circumstances exist; i.e., it is abandoned, impeding traffic, or threatening public safety or convenience. Aside from noting (fn. 5) that there was no Washington State statute allowing for an impound of a vehicle under these circumstances, none of the community caretaking factors were found to exist in this case, particularly in light of the fact that defendant told Officer Bonney that he had a friend who could come out and retrieve his vehicle. Therefore, an inventory search of defendant's vehicle was not lawful under these circumstances. The evidence found in defendant's truck, therefore, was properly suppressed by the trial court.

NOTES:

People v. Leal

178 Cal.App.4th 1051

RULE: Searches incident to arrest in a residence, after the arrestee has been fully secured and there are no other third parties in the residence, are unlawful.

FACTS: Salinas Police Officers Shaw and Schwaner, and two others, went to defendant's home for the purpose of serving a misdemeanor arrest warrant on him. The officers had prior knowledge that defendant, a gang member, might be armed and was using drugs. With the house surrounded, Officer Schwaner knocked at the front door. When someone inside responded; "Who's there?", Schwaner identified himself as a Salinas police officer. This was followed by some 45 minutes of silence while the officers patiently continued to knock at the door. Finally, defendant opened the door. As he stood in the threshold, Officer Schwaner had him turn around and handcuffed him. He was led away to a police car some 30 to 38 feet away. Meanwhile, a protective sweep was done of the house. Finding no one else inside, Sergeant Shaw searched the area immediately around where defendant had been standing when he was arrested. Picking up a sweatshirt from a small rocking recliner that sat about a foot from the door, Sgt. Shaw found a loaded semiautomatic pistol tucked between the arm and the cushion of the recliner. Upon recovering this weapon, it was noted that the serial number had been removed. The recovery of the gun occurred within 2 to 3 minutes of defendant's arrest. Charged in state court with obliteration of the identification numbers of a firearm (P.C. § 12090) and various gang allegations, defendant's motion to suppress the gun was denied. After pleading guilty, defendant appealed. The Sixth District Court of Appeal reversed, but a petition to the California Supreme Court was granted. The Supreme Court then sent the case back to the Sixth District Court for rehearing in light of the recently decided U.S. Supreme Court decision of *Arizona v. Gant* (2009) __ U.S. ___ [129 S.Ct. 1710; 173 L.Ed.2d 485].

HELD: On rehearing, the Sixth District Court of Appeal again reversed defendant's conviction, finding that the motion to suppress the gun should have been granted. The Court first noted that, in its opinion (recognizing the contrary authority), even prior to *Gant*, searching the area immediately surrounding where defendant had been physically arrested was unlawful. "Searches incident to arrest" are lawful according to the rule set out in *Chimel v. California* (1969) 395 U.S. 752. Pursuant to *Chimel*, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape . . . (and to) search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel* further recognized that "a like rule" allowed for the search of "the area into which an arrestee might reach in order to grab a weapon or evidentiary items," i.e., "the area within his immediate control." This rule, however, contrary to subsequent authority, is limited to the situation where the arrestee is physically able to lunge for weapons or destroy evidence. Once the arrestee has been removed from the area and secured, *Chimel* is no longer applicable. The Court recognized that handcuffing the suspect alone, before he has been removed and secured, may not be sufficient to thwart the applicability of *Chimel*. It also recognized that where there are other unsecured persons at the scene, or another person whose whereabouts is unknown, *Chimel* may still apply. (*People v. Summers* (1999) 73 Cal.App.4th 288.) But in the instant case, after the protective sweep of defendant's home prior to the search, along with defendant being handcuffed and placed into a nearby patrol car, there was no longer any exigency justifying a *Chimel* search. Also, the Court rejected the People's argument that the police shouldn't lose the right to do a search incident to arrest merely because they chose to make the situation safer by handcuffing and securing the arrestee. This argument makes the erroneous assumption that the police have a "right" to do a search incident to arrest. This is not the case. To the contrary, searches incident to arrest are an exception to the general rule that warrantless searches

are illegal absent an exigent circumstance. The police do not have the right to do such a search. "Only if the situation remains unstable, i.e., police officers must arrest someone but by doing so unavoidably place themselves in personal peril or incur the risk of losing evidence, may the police conduct a warrantless search in the suspect's immediate vicinity during the arrest." With the decision by the U.S. Supreme Court in *Arizona v. Gant*, the People conceded that the search following Leal's arrest was illegal. However it was also argued that because the Supreme Court recognized in *Gant* that the prior rule was "muddled," providing the officers with qualified immunity from civil liability, the officer's good faith should preclude the suppression of the gun in this case. This argument is based upon the recognition that the exclusionary rule is to be applied only when there is a "sufficient likelihood that the remedy (of exclusion) will deter future particularly undesirable conduct by the state, but only then." (*Herring v. United States* (2009) 555 U.S. 135.) The Court here, however, found that the rule of *Chimel*, at least as applied to residences (*Gant* being a vehicle search case), despite some contrary federal court of appeals decisions, has never been in doubt under California authority. Absent an exigency (or consent), a search incident to arrest has always been unlawful. The officers' claimed "good faith" reliance upon some prior rule, therefore, does not save the search here.

NOTE: Had it been understood that searches incident to arrest in a residence are illegal once the arrestee has already been secured, this new case wouldn't have been surprising. Searches incident to arrest in a vehicle have been approved for years by the U.S. Supreme Court (*New York v. Belton* (1981) 453 U.S. 454.). A residence has a higher expectation of privacy than does a vehicle. *Arizona v. Gant* overruled *Belton*, reversing some 28 years of rulings that, in theory, would have upheld the search in *Leal*. The Court here differentiated *Summers* (where a search incident to arrest in a residence was approved) by the fact that defendant, although handcuffed, was merely in the process of being led away, there was one other resident still in defendant's residence (i.e., a trailer), and a third resident was still unaccounted for. Because the police didn't have full control of the scene yet, the warrantless search for weapons and evidence was allowed. That distinction is important. Keep it in mind when making the decision whether to search.

NOTES:

United States v. Ruckes

(9th Cir. 2009) 586 F.3d 713

RULE: Searches of vehicles incident to an occupant's arrest, where the occupant has already been secured inside a patrol car, are illegal absent limited exceptions. But where the car is to be impounded and thus subject to an inventory search, the doctrine of inevitable discovery may save the evidence.

FACTS: A Washington state trooper stopped the defendant for speeding on an interstate highway. After the defendant told the trooper he did not have a license or other form of identification, the trooper ordered the defendant out of his car and placed him in the backseat of the trooper's patrol car. The trooper then ran a computer check that revealed defendant's license was suspended (under a Washington State law) for failure to make child support payments. The trooper told the defendant he planned on searching defendant's car. When the defendant questioned the reason for the search, the trooper explained he not only had authority to search defendant's vehicle based on his arrest for a suspended license, but, under Washington law, he also had authority to impound the car for thirty days. Before conducting the search of the car, the trooper asked if anyone was available to take control of the car. The defendant said his mother owned the car but would probably be unable to remove it from the side of the freeway. At that point, the trooper decided he would impound the car since he was not going to let the defendant drive away in it and the owner of the car was not available to drive it off. The trooper then conducted a search of the defendant's car, finding a large bottle of cocaine and a firearm. The defendant was charged in federal court with unlawful possession of the cocaine and with being a felon in possession of a firearm. The defendant moved to suppress the evidence. The district court judge denied the motion, holding that the search was a valid search incident to arrest and that, even if the search was invalid, the evidence found inside the car would still be admissible since it would have inevitably have been discovered during an inventory of the car's contents. The defendant appealed the denial of the motion to suppress.

HELD: The Ninth Circuit Court of Appeals, although finding the search to be illegal, affirmed. While this case was pending appeal, the United States Supreme Court decided *Arizona v. Gant* (2009) __ U.S. __ [129 S.Ct. 1710; 173 L.Ed.2d 485], making defendant's trial-level argument (whether the search occurred before or after his arrest) irrelevant. *Gant* held that when a vehicle's occupant has already been secured and can no longer "lunge" for evidence or weapons, a warrantless search incident to arrest is unlawful. *Gant* overruled the long-standing rule of *New York v. Belton* (1981) 453 U.S. 454, which had authorized such a search. The only exception is when there is a "*reasonable basis to believe*" that the vehicle contains evidence related to the cause of the search. Because defendant in this case had been secured in the patrol car, and because there wasn't a "reasonable basis to believe" that the car contained any evidence related to his driving on a suspended license (the only then-existing probable cause justifying an arrest), *Gant* dictated that searching the car incident to arrest was unlawful. However, the Ninth Circuit upheld the search under the inevitable discovery doctrine. Under the inevitable discovery doctrine, even if the police improperly conducted a search, evidence discovered during that search will not be suppressed if the prosecution can show that the evidence would inevitably have been discovered by lawful means. In the instant case, the trooper was authorized to impound the defendant's car under a Washington State law that permits impoundment when the driver is arrested for driving with a suspended license and/or the car would otherwise be left unattended on a highway where it would pose an obstruction to traffic or jeopardize public safety. Moreover, if a vehicle is going to be impounded, law enforcement may conduct "a good faith inventory search following a lawful impoundment without first obtaining a search warrant." Since the prosecution was able to show that, regardless of the unlawful search incident to arrest, the trooper was (i) planning to conduct a lawful impound of the car, (ii) the impoundment would have resulted in a inventory

search, and (iii) the inventory search would have resulted in the drugs and firearm being discovered, the Ninth Circuit upheld the seizure of the drugs and firearm under the inevitable discovery doctrine.

NOTE: Without discussing the issue, the Court assumed that putting a suspect into a locked patrol car, even though unhandcuffed, was sufficient to trigger the rule in *Gant*. But apparently the opposite is not true. Merely handcuffing a suspect, but *not* putting him into a locked patrol car, does not necessarily secure him sufficiently to prevent an officer from doing a lawful search incident to arrest. (See *People v. Leal* (2009) 178 Cal.App.4th 1051, 1062 [in this Reference Guide at page 65.)

NOTES:

People v. Shafrir

(2010) 183 Cal.App.4th 1238

RULE: The constitutional requirement for "standardized criteria" to guide officers doing inventory searches of impounded vehicles applies only to the inventory search itself and not necessarily to the decision to impound the car in the first place.

FACTS: Defendant was stopped for speeding by two California Highway Patrol officers after they followed him off a freeway where he was clocked at a little over 110 mph. Stopped in Oakland, defendant was determined to be under the influence of alcohol. Believing that the neighborhood wasn't a safe place to leave defendant's newer Mercedes, the officers decided to tow it pursuant to V.C. § 22651(h). Preparatory to impounding it, one of the officers did an inventory search. In the trunk, the officer found three large bags of marijuana and $50,000 in cash. Defendant was charged in state court with various felony marijuana offenses as well as driving while under the influence. At his preliminary hearing, defendant filed a motion to suppress the contents of his car's trunk, which was denied. Bound over to superior court, defendant then filed a motion to dismiss, per P.C. § 995, arguing that the prelim magistrate erred in finding the impoundment of his car to be lawful. The trial court judge agreed with defendant's argument that the officers had abused their discretion in deciding to impound the Mercedes rather than leave it parked because the officers ignored policies as provided for in the CHP manual. In the manual, while describing various legal justifications for impounding a vehicle, nothing expressly authorizes removal of a vehicle in the case of a first offense DUI. Per the trial court, the officers' decision to remove defendant's vehicle pursuant to the safekeeping provision of V.C. § 22651(h) was "an improper contravention of the CHP manual's procedures." Although finding nothing unreasonable in what the officers did, the trial court was bothered by the lack of any "standardized criteria" in the CHP manual for impounding defendant's car under these circumstances. The People appealed from the trial court's dismissal of the case.

HELD: The First District Court of Appeal (Div 1) reversed. The legal authority relied upon by the defendant is the U.S. Supreme Court decision of *Colorado v. Bertine* (1987) 479 U.S. 367, where the High Court discussed the need for standardized criteria to guide officers in exercising their discretion while searching impounded vehicles. According to *Bertine*, the Fourth Amendment does not prohibit the police from using their own discretion so long as that discretion was exercised according to standard criteria and on the basis of something other than a mere suspicion that evidence of criminal activity will be found in the car. (See also *Florida v. Wells* (1990) 495 U.S. 1.) On appeal, the People's argument was that *Bertine* (and *Wells*), requiring an officer's discretion be exercised according to standardized criteria, applies only to the inventory search of a vehicle, and not necessarily to the decision to impound the car in the first place. The Appellate Court agreed. The decision to impound a vehicle is a part of an officer's "community caretaking" function. As such, the test for determining the legality of impounding a vehicle is merely one of reasonableness, based upon all the facts and circumstances. Although *Bertine* indicates that an impoundment decision made pursuant to standardized criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to standardized criteria, it is not legally necessary that that be the case. "(T)he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances." In this case, where the evidence supported the officers' opinion that it was not safe to leave defendant's Mercedes at the site of the arrest, and there was no indication that the car was impounded merely as a subterfuge for investigating the possibility that it might contain evidence of criminal activity, impounding the car was in fact reasonable under the Fourth Amendment.

NOTE: The Court further held that even if it agreed with those few courts that have found *Bertine*'s standardized criteria requirements to apply to the impoundment decision, the officers here did have the necessary "standardized criteria" to guide their decision making. Specifically, the CHP manual directs officers to abide by the provisions of V.C. § 22651(h) when deciding to impound a car based upon a need to protect it and its contents. Despite the trial judge's contrary opinion, that's enough to meet *Bertine*'s "standardized criteria" requirements. This is an excellent case on this issue, even if a little difficult to decipher. For patrol and traffic officers faced with the decision whether to impound vehicles on almost a daily basis, its one worth being familiar with.

NOTES:

People v. Torres

(2010) 188 Cal.App.4th 775

RULE: Impounding and doing an inventory search of a vehicle as a pretext for looking for evidence of suspected criminal activity, and not pursuant to the officer's "community caretaking" function, is illegal.

FACTS: An Orange County deputy sheriff observed defendant driving a pickup truck in Anaheim, and pulled him over when defendant made an unsafe lane change and failed to signal a turn. Defendant pulled into a parking stall in a public parking lot near a restaurant. After being stopped, defendant admitted to the deputy that he didn't have a driver's license. The deputy asked for and received consent to search his person, resulting in the discovery of four cell phones and $965. The deputy, deciding to impound defendant's pickup pursuant to V.C. § 14602.6(a)(1) (impoundment of a vehicle driven by an unlicensed driver), handcuffed him, and put him into the back seat of his patrol car. An inventory of the contents of the pickup resulted in 12 ounces of methamphetamine being found under the driver's seat and a "pay and owe" sheet in the back seat. Based upon the discovery of these items, a search warrant was obtained for defendant's home where nearly three pounds of meth and $133,074 were found. Charged with a bunch of narcotics-related offenses in state court, defendant filed a motion to suppress (per P.C. § 1538.5) the items found in his truck and, arguing that an illegal stop and search of his truck poisoned the resulting search warrant, a motion to quash the search warrant and suppress evidence recovered from his house. The prelim magistrate denied the motions and bound defendant over for trial. In the trial court, defendant renewed his motions to suppress evidence and quash the search warrant. He also filed a concurrent motion to dismiss, per P.C. § 995. The trial court denied these motions and defendant pled guilty. He appealed from his three-year prison sentence.

HELD: The Fourth District Court of Appeal (Div. 3) reversed, finding the searches here to be illegal. At the above listed hearings (to suppress, quash and dismiss), the deputy candidly admitted stopping defendant's truck based upon information he'd previously received from a narcotics officer to watch for defendant and develop probable cause to stop him (sometimes referred to as a "wall stop"). So the deputy did that; watching defendant until he violated some Vehicle Code sections. The deputy also admitted that his decision to impound the truck was for the purpose of facilitating an inventory search, and that he used the inventory search as a means to look for whatever narcotics-related evidence might be in defendant's truck. The deputy further testified, however, that he followed his department's policies pursuant to the so-called law enforcement "community caretaking function" in using his discretion as to whether to impound and conduct an inventory search of defendant's truck. First, the Appellate Court agreed with the prosecution that the stop of defendant's truck and his detention was lawful. Whatever the deputy's motives or intent were in stopping and detaining defendant, there was an "objectively reasonable basis" for the stop; i.e., the observed traffic violations. An officer's motives for a detention (including a traffic stop) are irrelevant, with certain exceptions, so long as there is an objectively legal basis for the stop. (*Whren v. United States* (1996) 517 U.S. 806.) The Court further held that handcuffing defendant and putting him into his patrol car while conducting the inventory search was not a "de facto arrest," but rather a reasonably necessary procedure for the officer's safety. However, the legality of impounding a vehicle turns on an officer's exercise of his discretion pursuant to law enforcement's "community caretaking function," "other than suspicion of evidence of criminal activity." Under the community caretaking function, a car may be impounded pursuant to a state statute so long as the impoundment can be justified by a justifiable concern that if the vehicle is left at the scene, it may be stolen, broken into, that it is blocking a driveway or crosswalk, or that it poses a hazard or impediment to other traffic. There was no such showing in this case that any of these concerns were a factor in the deputy's decision to impound defendant's truck. To the

contrary, the deputy testified that his primary reason for impounding the truck was to justify a search for narcotics-related evidence. However, the Supreme Court held that using an inventory search as an excuse to look for evidence of a crime (without probable cause or other legal justification) is illegal. While an officer's subjective motivations in stopping a vehicle in the first place are irrelevant so long as there is some objectively reasonable basis for doing so, the same is not true for an officer's decision to impound the vehicle. His subjective motives for impounding a vehicle are relevant. I.e., "(D)id he impound the truck to serve a community caretaking function or as a pretext for conducting an investigatory search." The deputy here candidly testified that his motive was the latter. The Whren decision itself notes that inventory searches are an exception to the rule that the officer's subjective motives are irrelevant. (Id. at p. 812.) As such, the impoundment of defendant's truck, the inventory search, and the subsequent search warrant for defendant's house, were illegal. The evidence should have been suppressed.

NOTE: Although the court's reasoning in this case will cause problems in interpretation, the court reached the right result that the inventory search was improper. State and federal courts have clearly held that, despite an authorizing statute, an officer cannot impound the vehicle unless one or more of the "community caretaking" rules (as explained above) apply. Therefore, an officer must articulate a valid reason for impounding and inventorying a vehicle that also complies with valid department policy regarding impounds and inventories. In this case, according to the deputy's testimony, the search was either conducted pursuant to an invalid impound policy (for example, a policy that allows officers to find any reason for impounding a car when they suspect evidence of criminal activity), Or, the department impound policy was proper (in that it did not allow searches to be conducted for the suggested improper purpose) but the deputy wasn't following this policy because he testified basically that he was going to find a reason to search the car regardless of department policy. The bottom line is that the record must show that an officer acted in conformance with a valid inventory and impound policy. Here, since the deputy's testimony showed that he did not, the court properly found the inventory search improper.

NOTES:

U.S. v. Pineda-Moreno

(9th Cir. 2010) 591 F.3d 1212

RULE: The warrantless attaching of electronic tracking devices to the undercarriage of a vehicle while the vehicle is parked in a private driveway within the curtilage of a suspect's home, but where there are no obstructions preventing the public from entering the driveway and which is exposed from the street, is legal.

FACTS: A Drug Enforcement Administration (DEA) special agent noted a group of men purchasing a large quantity of fertilizer from Home Depot. The agent recognized the fertilizer as a type frequently used in growing marijuana. The men drove off in the defendant's Jeep Grand Cherokee. An investigation led to information that the defendant and his associates were also purchasing irrigation equipment and deer repellant at several other stores, often using the defendant's Jeep. After determining where the defendant lived, a four-month investigation ensued during which various types of mobile tracking devices were used, attaching them to defendant's Jeep. Each device was about the size of a bar of soap and had a magnet affixed to its side allowing it to be attached to the underside of a car. These devices were used on seven different occasions, being attached to the defendant's car four times while the car was parked on the street in front of his house, once while the car was in a public parking lot, and twice while parked in his own driveway within the curtilage of his residence (a trailer). The driveway to the defendant's trailer was not enclosed by a gate or other type of obstruction, and was visible from the street. There were no "No Trespass" signs. Eventually, one of the tracking devices indicated that the defendant was just leaving a suspected marijuana grow site. His car was stopped. A consensual search of his car and his trailer led to the recovery, along with other evidence, of two large garbage bags of marijuana. Charged in federal court with various marijuana-related counts, his motion to suppress was denied. The defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. On appeal, the defendant first argued that using an electronic tracking device, attached to his Jeep and monitoring his movements, was itself a violation of his Fourth Amendment, violating his reasonable expectation of privacy. The Court disagreed, first striking down the defendant's argument that the Fourth Amendment was violated by attaching a tracking device to the undercarriage of his Jeep while it was parked on the street in front of his house, or while in public parking lot. It has previously been held that one's expectation of privacy is not violated by attaching an electronic tracking device to the outside of a car while that car is located at any location outside the curtilage of his home. (*United States v. McIver* (9th Cir. 1999) 186 F.3d 1119.) The Court then extended the rule of *McIver* to the circumstances of this case; i.e., when the defendant's car is parked within the curtilage of his home, at least when the vehicle is in an area that is not gated off or otherwise enclosed, there are no "No Trespassing" signs or other barriers to someone entering the area, and which is exposed to view from the street. In fact, it was noted that a person who intends to walk to the front door of defendant's trailer would have to go through the driveway to get there. Under these circumstances, with the defendant's vehicle being at best in only a "semi-private" location, there was no expectation of privacy that would prevent the officers from approaching the Jeep and attaching a tracking device to its exterior. The Court also rejected the defendant's other arguments, ruling as follows: (1) Attaching the tracking device to the vehicle during the early morning (e.g., 4:00 or 5:00 a.m.) hours does not increase the defendant's privacy expectations. The timing of the officers' actions is immaterial. (2) The fact that tracking devices are not generally used by the public does not make its warrantless use by law enforcement illegal. (3) The United States Supreme Court, in *Kyllo v. United States* (2001) 533 U.S. 27 (necessitating the use of a search warrant when using a "thermal imaging device" on a private residence) did not modify the legal

analysis applicable to the use of such technological devices. The defendant's motion to suppress, therefore, was properly denied by the trial court.

NOTE: This case is important in allowing the warrantless attachment of tracking devices to the outside of a vehicle even when the car is parked in the suspect's own driveway within the curtilage of (i.e., close to) his home. But note the exceptions that are still applicable. The location of the car must be somewhere to which the public has access. If the driveway is somehow enclosed, gated off, or even out of view from the street, then a warrant will be needed. A simple "No Trespassing" sign might be enough to increase the suspect's expectation of privacy to the degree where a search warrant is needed. Also, if the idea is to wire the tracking device into the vehicle's electrical system, then a warrant is likely needed. And there's still valid case law saying that if the tracking device is taken into the house, even if by the suspect, it must be turned off absent a warrant authorizing its use within the home. (*United States v. Karo* (1984) 468 U.S. 705.) Arguably, this would include when the defendant parks his car in the garage after the device has been attached.

NOTES:

In re K.S.

(2010) 183 Cal.App.4th 72

RULE: The search of a student by a school administrator requires only that there be a reasonable suspicion of criminal activity or a violation of school rules. When a school official independently decides to search a student and then conducts that search, the lower standard of reasonable suspicion for the search applies - even if the police provide the information justifying the search and are present when it occurs.

FACTS: A narcotics detective with a city police agency received information from a confidential informant that a minor, a student at the local high school, was in possession of Ecstasy pills, hidden in a slit in his pants. The detective passed along this information to a school resource officer at a different high school in the same city. That school resource officer then contacted a vice-principal at the high school attended by the minor suspected of possessing Ecstasy. After the school resource officer told the narcotics detective he passed along the information to the vice-principal, the narcotics detective went to the minor's high school to see if the school was going to follow up on the information provided. Neither the narcotics detective nor the school resource officer asked the vice-principal to search or further investigate the minor. However, the vice-principal decided to conduct a search on her own accord, based on her concerns that the safety of the students would be compromised if drugs were on school grounds. After having a school security officer verify that the minor was in physical education class, the vice-principal went to the minor's locker accompanied by the narcotics detective and a second detective. The vice-principal asked the detectives to accompany her because she did not feel comfortable taking possession of drugs, should any be found. The vice-principal did not ask the detectives to conduct the search of the locker. Rather, she had a campus supervisor open the minor's locker and the vice-principal herself searched the pants located inside the locker. The vice-principal found a plastic bag containing several Ecstasy pills inside the pants. The minor was then detained. After a petition was filed in Juvenile Court, the minor filed a motion to suppress. The motion was denied. After the minor admitted to the offense, he appealed the denial of his suppression motion.

HELD: In *New Jersey v. T.L.O* (1985) 469 U.S. 325, the United States Supreme Court held that searches of students by school officials are justified if the search is reasonable; no probable cause was required. Similarly, the California Supreme Court in *In re William G.* (1985) 40 Cal.3d 550, held that searches by school officials are lawful so long as the official has "a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute)." These courts reached this compromise by balancing the student's right to privacy with the school's need to closely supervise school children in order to preserve order and a proper educational environment. Both courts left open the question of what standard governs searches by school officials when the officials conduct the search "in conjunction with or at the behest of law enforcement agencies."

In *K.S.*, the minor contended "the warrantless, reasonable suspicion standard for school officials set out in *T.L.O*. does not apply because, in conducting the locker search, [the vice-principal] was 'carrying out a police initiated investigation in cooperation with the police for law enforcement purposes.'" However, the court held that when a school official independently decides to search a student and then conducts that search, the *T.L.O*. standard of reasonable suspicion applies, even if the police provide the information justifying the search and are present when it occurs. The court found that whether the police played a sufficient role to transform a school search into a law enforcement search will turn on the totality of the circumstances and under that test, the search was a school, not a law enforcement, search. The court

observed law enforcement was really no more than the conduit by which the information was passed on to the school's vice-principal, the police did not advise, instruct, or direct the school official to conduct the search, the school official performed the actual search, the school official exercised her independent judgment in deciding to conduct the search, and the decision to search was designed to "protect the safety of the school." The evidence was thus lawfully seized.

NOTES:

United States v. Franklin

(9th Cir. 2010) 603 F.3d 652

RULE: A motel room may be a parolee's residence when the parolee is in fact living there, even if temporarily. Probable cause to believe the motel room is in fact the parolee's residence justifies law enforcement's enforcement of the parolee's search and seizure conditions.

FACTS: The defendant, with three prior felony convictions, was subject to "community custody" (i.e., parole) under Washington State law. As a condition of his community custody, the defendant was to report his current address and any change of address to his "Community Corrections Officer," John Hernandez. The defendant was also subject to search and seizure without probable cause or a warrant (i.e., a "Fourth waiver"). On January 4, 2006, the defendant told Hernandez that he was homeless. Hernandez instructed the defendant to contact him and report where he was staying by midnight that night and be ready to say where he planned to reside in the future. He was also told to come in and report in person by January 17. The defendant was not heard from again. On January 18, a female informant with whom the defendant had had a child called Hernandez and told him the defendant was living in Room 254 at a local motel. She also said that the defendant was staying with another man and that the defendant had a handgun and ten rounds of ammunition. Hernandez believed the informant because he had had dealings with her before and knew her to be credible. Hernandez contacted Officer Michael Roberge of the Spokane Police Department and asked him to verify that the defendant was in fact staying in Room 254 of the listed motel. A motel clerk identified a photograph of the defendant as the resident in Room 254, and told Roberge that the defendant had personally rented the room. Armed with this information, Hernandez went to Room 254 and knocked. A voice that Hernandez recognized as the defendant's answered, "Who is it?" Hernandez identified himself and the defendant opened the door. He was taken into custody and the room was searched. A handgun that the defendant admitted was his was found. He was eventually indicted in federal court with being a felon in possession of a firearm and possession of a stolen firearm. He filed a motion to suppress the gun, which was denied. The defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The defendant's argument on appeal was that Hernandez did not have the necessary probable cause to believe that Room 254 was in fact his place of residence. It was not contested that he was subject to search and seizure conditions. As a part of these conditions, his place of residence was subject to a warrantless search when based upon no more than a reasonable suspicion to believe that he was in violation of his probation. (*United States v. Knights* (2001) 534 U.S. 112.) The Ninth Circuit, however, has previously decided that law enforcement officers must have full probable cause to believe that the place being searched is in fact the defendant's residence. (*Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072.) "Probable cause requires 'that the facts available to the officer would warrant a man of reasonable caution in the belief' that Room 254 was Franklin's residence at the time." In this case, the facts "overwhelmingly" support the trial court's conclusion that Hernandez did in fact have the necessary probable cause to believe that the defendant's residence, at that time, was Room 254. With reliable informant information, verified by the desk clerk, and Hernandez recognizing the defendant's voice coming from the room when they knocked on the door, there is no doubt that probable cause existed to believe that the defendant was staying in Room 254, at least at that time. A residence need not be "an old ancestral home." But it must involve something more than a one-night "sleepover," or that the probationer spent the night there occasionally, or that he happens to have been seen there. When the location is a motel room identified as having been rented by the person in question, the issue is less difficult to resolve. Also, per the Court, the temporary nature of the occupancy does not change the fact that for the night or nights in question, the defendant rented the room and was legally entitled to use it and to control access to

it. For that time period, therefore, Room 254 was the defendant's residence. Having the necessary probable cause to believe that Room 254 was the defendant's residence, Hernandez lawfully entered and searched it pursuant to the defendant's Fourth Amendment waiver.

NOTE: The apparent purpose of this case was to discuss the problem of establishing the necessary probable cause to believe a parolee lives there when the residence is something other than the traditional house or apartment. A motel room, even though not one's residence on a permanent basis, can still be a residence for that time period while the person is in fact living there. What constitutes "living there" is the issue. An officer must clearly document what information is available on this issue so it can be thoroughly litigated. Also note that *U.S. v. Knights* did not say that a "reasonable suspicion" to believe evidence of a probation violation (as opposed to a parole violation) is a necessary prerequisite to a warrantless search, as claimed by the Court here. *Knights*, dealing with the rights of probationers as opposed to parolees, merely held that a warrantless Fourth waiver search is lawful whenever reasonable suspicion exists, specifically leaving open the question whether such a search is also lawful with less than a reasonable suspicion (p. 120, fn 6). The California rule is that no suspicion is needed. (See *People v. Medina* (2007) 158 Cal.App.4th 1571.) Law enforcement is still waiting to hear from the U.S. Supreme Court on that issue. (See also *Samson v. California* (2006) 547 U.S. 843, where the U.S. Supreme Court held that searching a parolee without any suspicion is lawful.)

NOTES:

Bryan v. MacPherson

(9th Cir. 2010) 630 F.3d 805

RULE: Use of a Taser on an irate, but unarmed person stopped for a traffic violation, absent the person posing an immediate threat to safety, resisting arrest, or attempting to escape, is unreasonable and grounds for civil liability.

FACTS: Twenty-one year old Carl Bryan was having a bad day, and apparently didn't handle bad days very well. While Bryan stayed overnight with his brother in Camarillo, in Ventura County, a cousin's girlfriend accidentally took his car keys to Los Angeles. So Bryan had to get up early and, while dressed only in tennis shoes and the boxer shorts and t-shirt he'd slept in, he spent part of his morning retrieving his keys. He then headed south to his parents' home in Coronado, San Diego County. Finally on the road, while attempting to make up for lost time, Bryan was stopped by the California Highway Patrol for speeding. "This upset him greatly." Crying and moping, he found the need to remove his t-shirt to wipe his sweating face. Now stripped down to his boxer shorts and tennis shoes, he finally crossed the Coronado Bridge from the City of San Diego into Coronado at around 7:30 a.m. But Bryan wasn't home free yet. At the end of the bridge stood Coronado Police Officer Brian MacPherson, watching for seatbelt violations. Noticing that Bryan was not seat-belted in (a fact Bryan blamed on being stressed out from the prior ticket), Officer MacPherson stepped in front of Bryan's car, signaling him to stop. MacPherson approached the passenger window and asked Bryan if he knew why he'd been stopped. An angry and frustrated Bryan merely stared straight ahead. Officer MacPherson told Bryan to turn his radio down and pull over to the side. Bryan complied, but not without yelling expletives as he pounded on his steering wheel. Despite being told to stay in his car, a command Bryan claimed he didn't hear, he stepped out. At this point, Officer MacPherson was confronted by a 21-year-old male, standing 15 to 25 feet away, in his boxer shorts and tennis shoes, "yelling gibberish," all the while hitting himself in his thighs. However, Bryan never verbally threatened him or attempted to run away. Officer MacPherson testified that Bryan took a step towards him, which Bryan denied. The physical evidence indicates that Bryan was actually turning away from MacPherson at that time. Without a verbal warning, MacPherson drew his Taser X26 and shot it at Bryan, hitting him with one of the Taser's probes in the side of his upper left arm. Immobilized, Bryan did a face plant onto the pavement, fracturing four teeth and suffering facial contusions. The Taser's probe later had to be surgically removed from his arm. Charged in state court with a violation of P.C. § 148 (interfering with a peace officer in the performance of his duties), the jury hung. The prosecution later dismissed all charges. Bryan then sued the officer for an excessive use of force. MacPherson filed a motion for summary judgment (dismissal before trial), which was denied. He appealed.

HELD: The Ninth Circuit Court of Appeals reversed. Despite finding that the force used was excessive under the circumstances as alleged by Bryan (Note that the Court, in this circumstance, must assume as true the facts as alleged by the plaintiff, Carl Bryan.), Officer MacPherson was entitled to qualified immunity from civil liability. In discussing the reasonableness of the force used, the Court first noted that the instrument used, a "Taser X26," is a weapon that uses compressed nitrogen to propel a pair of "probes" (i.e., aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires) at its target. Shot at a person at a rate of 160 feet per second, it delivers a 1,200 volt electrical charge into the person it strikes, even through up to two inches of clothing. The electrical impulse instantly overrides the target's central nervous system, paralyzing the muscles throughout the body, rendering him limp and helpless. The Tasered person experiences excruciating pain that radiates throughout his body. The Taser, per the Court, is a form of non-lethal force, constituting an "intermediate or medium, thought not insignificant, quantum of force." The general rule is that any use of this (or any) force must be no greater than is necessary under

the circumstances. Also, the need for its use must be balanced with the governmental interest involved under the circumstances. Specifically, in determining the governmental interest involved, the Court must consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether that suspect is actively resisting arrest or attempting to evade arrest by flight, plus (4) any other exigent circumstances present at the time. (1) The crime in this case was a seatbelt violation, or an infraction; a relatively insignificant offense. (2) The threat to the officer was, in the Court's opinion, relatively insignificant. The Court recognized that police officers are forced to make split-second decisions while usually being unaware of whether the confronted person might be a real danger to them. But in this case, it was apparent that plaintiff was certainly unarmed (standing there in his boxer shorts). He never made any movement toward the officer (although Officer MacPherson contested this issue), with the physical evidence tending to corroborate Plaintiff, showing that he was apparently turning away from the officer while at a distance of some 15 to 25 feet. (3) While agitated and obviously out of control, Bryan never resisted arrest nor made any attempt to flee. In fact, except for getting out of the car after being ordered not to, Bryan obeyed all the officer's commands. In responding to Officer MacPherson's argument that plaintiff appeared to have some sort of mental issues, the Court found this all the more reason to minimize the force used. The Court was also critical of Officer's MacPherson's failure to warn Bryan, which would have been possible under the circumstances. It also noted that other officers were en route to assist, and that absent an immediate necessity, MacPherson could have waited. Under these circumstances, the Court agreed with Bryan that the force used was clearly excessive. However, because the law on the use of Tasers is still in its development stage, a officer could have reasonably believed that the use of a Taser was lawful under these circumstances. Therefore, the trial court erred in finding that the officer was not entitled to qualified immunity.

NOTE: The Court initially found that Officer MacPherson was not entitled to qualified immunity (see 590 F.3d 767), but changed its mind and republished its decision as briefed here. This change of opinion was motivated by the fact that there is no U.S. Supreme Court decision evaluating the use of Tasers. Also, other case law has noted that "(t)he Taser is a relatively new instrument of force, and case law related to the Taser is developing." (See *Brown v. City of Golden Valley* (8th Cir. 2009) 574 F.3d 491, 498.) While law enforcement officers have the right to defend themselves with appropriate force, having access to a non-lethal weapon (Taser, pepper spray, night stick, etc.) doesn't mean it's always okay to use it.

NOTES:

Berghuis v. Thompkins

(2010) 560 U.S. __ [130 S.Ct. 2250; 176 L.Ed.2d 1098]

RULE: Attempts to invoke one's *Miranda* right to silence must be clear and unequivocal to be legally effective. Implied waivers are good so long as the prosecution establishes by a preponderance of the evidence that a *Miranda* warning was given and that the accused, while understanding his rights, made an uncoerced statement.

FACTS: Samuel Morris died from multiple gunshot wounds as a result of a drive-by shooting in Southfield Michigan. Defendant Thompkins, a suspect in the shooting, fled to Ohio where he was arrested about a year later. While defendant was awaiting extradition back to Michigan, two Southfield detectives traveled to Ohio to interview him. Prior to any questioning, Detective Helgert read from a form listing the *Miranda* rights. Also included was a provision that said: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." Defendant was asked to read this portion himself aloud, which he did. But he refused to sign the form indicating that he understood his rights. So the detective verified verbally that he understood his rights. Defendant was never asked if he waived his rights. Instead, the detectives launched right into a series of questions concerning defendant's involvement in the Michigan murder. Over the next two hours and 45 minutes, defendant was silent for the most part, only answering a couple of questions, and then only with no more than a short "yeah," "no," or "I don't know" response. However, defendant never specifically asked to remain silent or for the assistance of an attorney. Finally, defendant was asked if he believed in God and if he prayed to God. Defendant answered in the affirmative to both questions. Detective Helgert then asked defendant; "Do you pray to God to forgive you for shooting that boy down?" A tearful defendant answered "Yes" and looked away. This response was admitted into evidence when defendant was tried in Michigan state court for first degree murder and other related charges. He was subsequently convicted and sentenced to prison for life without parole. The Michigan Court of Appeal affirmed, and the Michigan Supreme Court denied review. Defendant filed a writ of habeas corpus with the federal District Court, which was denied. However, the Sixth Circuit Court of Appeals reversed, finding that defendant's right to silence had been violated. According to the Court of Appeals, defendant's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." The United States Supreme Court granted certiorari.

HELD: The United States Supreme Court, in a split five-to-four decision, reversed the Sixth Circuit Court of Appeals and reinstated defendant's conviction. Defendant's argument on appeal was that, because he'd refused to say anything for a sufficient period of time, he had in effect invoked his right to silence. The inculpatory statements he made in the last 15 minutes of his interview, therefore, were improperly introduced into evidence against him. The majority of the Supreme Court disagreed. The Court has previously held that for an invocation of one's Fifth Amendment "right to counsel" to be legally effective, the suspect must do so clearly and unequivocally. An equivocal response is not a legally effective invocation and does not require that an interrogation be ended or even that officers seek clarification. (*Davis v. United States* (1994) 512 U.S. 452.) The Court here stated that there's no reason why the rule for invoking one's "right to silence" should be any different. Both types of invocation serve the same purpose; i.e., to protect the suspect's privilege against self-incrimination. In this case, defendant never made any attempt to invoke. Merely failing to respond to questions is not, by itself, an invocation. But it also may not be a wavier. To be a valid waiver, it must be both (1) voluntary, in the sense that it is the product of a free and voluntary choice rather than the result of intimidation, coercion, or deception, and (2) made with a full awareness of both the

nature of the right being abandoned and the consequences of the decision to abandon it. Even though the *Miranda* decision itself states that "a valid wavier will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained," subsequent cases have been more flexible. Waivers can be obtained despite the lack of an express or formal statement of waiver. "The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." This purpose may be met even where a wavier is implied from the circumstances. Announcing a new rule, the Court specifically held that; "If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate a valid waiver of *Miranda* rights." If, along with this, the prosecution proves that the accused understood his rights, then the resulting statements will be admissible in evidence. In this case, defendant chose not to invoke his rights. Although he was largely uncommunicative, he did occasionally respond and eventually admitted that he prayed for the victim. This is a "course of conduct" sufficient to show an intent to waive his rights. Also, there was no evidence of coercion. Neither the fact that the interrogation lasted three hours (which is not excessively long), nor the detective's reference to defendant's religious beliefs, made defendant's responses involuntary. Defendant's statements, therefore, were properly admitted into evidence against him.

NOTE: While express waivers still remain easier to prove in court, this is a major breakthrough for the legitimacy of implied waivers. Just remember, for an implied waiver to be valid, there must be evidence: (1) of a "course of conduct" on the defendant's part indicating an intent to waive, and (2) that the defendant understood his rights. Another important point of this case is that now, the rule on attempts to invoke one's "right to silence" is the same as the long standing rule for attempt to invoke one's "right to counsel;" i.e., it must be clear and unequivocal to be legally effective. Ambiguous invocations may be ignored. An officer is not obligated to seek clarification.

NOTES:

People v. Tate

(2010) 49 Cal.4th 635

RULE: (1) Failing to inform a suspect of the seriousness of an investigation is not a deception sufficient to invalidate his waiver of *Miranda* rights. (2) Use of an undercover agent to question an in-custody suspect does not implicate *Miranda*.

FACTS: Sarah LaChappelle was murdered in her Oakland home at some time between 8:00 p.m. on April, 18, 1988, and 11:00 a.m. the next morning. The autopsy showed that in addition to numerous blunt force injuries, defensive wounds, a broken jaw and missing teeth, she had 24 stab wounds and 28 puncture wounds. When found, there was a butcher knife stuck in her back and a barbecue fork in her neck. Her ring finger had been cut off, and her wedding ring was missing. Other jewelry, household items (e.g., a television and VCR), and her Oldsmobile Cutlass were all missing. Defendant sometimes lived with his grandmother across the street but was presently living with a girlfriend, Lisa Henry, at another location. At about 6:00 p.m. on April 19th, defendant was arrested while driving LaChappelle's car. The car contained the victim's television and VCR. Defendant immediately volunteered that he'd gotten the car from "a guy named Fred Bush." Defendant's sweater and shoes had bloodstains on it. He was transported to Oakland P.D.'s homicide division where a three-part all-night interview was initiated. Prior to obtaining a *Miranda* waiver, the investigators told defendant they were investigating the theft of LaChappelle's Oldsmobile and that a lady was "hurt" in the incident. After waiving his rights, defendant denied any criminal acts, claiming to have been at Henry's house all night. He further claimed that he received the VCR and television and borrowed the Oldsmobile from Bush in settlement for an old debt. When a tape recorder was finally turned on after about an hour and a half of unrecorded interrogation, defendant was again read and waived his *Miranda* rights. In this second segment of his interrogation, he provided more details and identified Bush from a photo. Another break was taken. At the beginning of the third segment of the interrogation, the investigators finally told defendant that the victim was dead. He denied ever being in the victim's home. Finally, the investigators told defendant that they knew he was lying because Bush was in jail. After confronting him with other evidence connecting him to the murder, defendant asked for a deal but was told that there would be none. The interrogation was ended that morning. A search warrant was obtained for Henry's residence resulting in the recovery of more of the victim's property which Henry said had come from defendant. After being interviewed, she was allowed to talk with defendant for about five minutes. The investigators later testified that Henry had asked to talk with defendant. Henry claimed that the investigators asked her if she wanted to talk to him to see if she could get him to tell the truth. After five minutes with defendant, she told investigators that he denied committing the crime, that Bush did it, and that he (defendant) had attempted to stop him. At trial, however, Henry changed her story and testified that when she asked defendant about Bush, he didn't say anything. When she asked him what had happened with the victim, defendant was "just vague" and "didn't really say." She claimed that she had just "misspoken to the officers." Defendant also testified at trial. With his Bush story compromised, he admitted that he had in fact been in LaChappelle's residence but that she was already dead. He claimed to have interrupted her killers, causing them to drop a pillow case full of LaChappelle's belongings. Defendant testified that took her property and her car in the hope of selling her property. He continued to deny that he'd killed her. His testimony was impeached with his prior denials about ever having been in the victim's house and claiming that Bush was the culprit. The jury didn't buy his story and convicted him of first degree murder with special circumstances. Sentenced to death, defendant's appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. (1) Failing to Fully Inform as to the Nature of the Interrogation: On appeal, defendant argued that, because he was mislead as to the scope of the interrogation, his *Miranda* waiver was invalid. Specifically, before advising him of his *Miranda* rights, the detectives told him only that they were investigating the theft of the Oldsmobile he was caught driving and that a lady had been "hurt" in the incident. He therefore argued that his waiver was not "knowingly" made, and his statements should not have been allowed into evidence against him. The Court rejected this argument. The U.S. Supreme Court has held that "a valid waiver does not require that an individual be informed of all information useful in making his decision or all information that might affect his decision to confess." (*Colorado v. Spring* (1987) 479 U.S. 564.) Failing to tell an in-custody suspect of all the possible topics of an interrogation is not trickery sufficient to vitiate an uncoerced wavier. It is also a rule of law that the use of deception does not invalidate a confession as involuntary unless the deception is of a type reasonably likely to procure an untrue statement. Defendant also argued that, by deceptively minimizing the seriousness of the investigation, the officers induced false, unreliable statements that were later used against him. However, defendant continually denied any involvement in what had happened to the victim up until the time he was finally told that she was dead. Also, despite what the officers told him, defendant actually knew full well that the victim was dead. In response to his own inquiry at the beginning of the first segment of his interrogation, he was told that he was in the offices of the homicide division. Also, per his testimony at trial, he was in the victim's home and saw that the victim was dead. There was no error, therefore, in admitting into evidence his statements obtained during his interrogation. (2) Use of an Undercover Police Agent: Defendant further argued that the officers illegally used Henry as an undercover agent to obtain more statements that were used against him at trial. He argued that her use as an agent should have been preceded by a third *Miranda* admonishment. The Court rejected this argument as well. It was at issue whether Henry was actually used as a police agent. But even if she was, *Miranda* was not implicated. "*Miranda* protects the Fifth Amendment rights of a suspect faced with the coercive combination of custodial status and an interrogation the suspect understands as official." (Italics in original) "(O)ne who voluntarily speaks alone to a friend, even during a break in a custodial interrogation, has no reason to assume, during the private conversation, that he or she is subject to the coercive influences of police questioning." So even if Henry was acting as a police agent, there's no requirement that defendant be Mirandized prior to talking with her. Defendant's statements to Henry were also lawfully used against him.

NOTE: The Fifth Amendment, not the Sixth Amendment, is the reason for *Miranda* admonishments. Practically speaking, this means that *Miranda* admonishments have to do with concerns about coercion due to the combination of custody and interrogation by a police official. The Sixth Amendment, on the other hand, has nothing to do with custody but instead concerns interference with a suspect's right to counsel after he has been formally charged with an offense or appeared in court. Use of an undercover agent in the latter circumstance is a problem because, whether questioned by police or an undercover agent on behalf of the police, the defendant's Sixth Amendment right to counsel is being interfered with after the judicial process has commenced. However, prior to attachment of the right to counsel under the Sixth Amendment, use of an undercover agent who the suspect thinks is a friend or ally does not implicate *Miranda* for the simple reason that the defendant does not feel the coercive influences of official interrogation by a friend or ally.

NOTES:

People v. Williams

(2010) 49 Cal.4th 405

RULE: (1) An invocation of one's right to the assistance of counsel and/or to remain silent must be unequivocal under the circumstances. An officer seeking clarification is not badgering. (2) A new *Miranda* admonishment and waiver is not necessary for successive interrogations so long as the second interrogation is reasonably contemporaneous with the prior waiver. (3) Interrogation tactics and psychological ploys are lawful so long as, under all the circumstances, they are not so coercive that they would tend to produce a statement that is both involuntary and unreliable.

FACTS: Forty-two year old Joanne Lacey left work at about 7:00 on the evening of March 20, 1989, driving her new blue Volvo. A witness later told police that at about 8:00 p.m. she observed a blue Volvo in the parking lot of the Altadena Boys Market being driven by a woman matching Lacey's description. She saw the car start to back out of a parking spot but it was still there minutes later when the witness left. At 9:45 p.m., a $200 withdrawal was made from Lacey's bank account at an automated teller in Pasadena. At about 10:30 p.m., Carrie Runnels, a friend of Lacey's, got a telephone call from her who, seemingly excited and rushed, asked Carrie for a $500 loan. Lacey said that she'd been in an accident and to meet her alone at a specific intersection in Pasadena. On the way to that location, Runnels noticed Lacey's blue Volvo following her. She pulled over and Lacey's car drove up next to her with Lacey in the passenger seat. Lacey extended her hand out of the window, took the cash from Runnels, and handed it to the driver. After telling Runnels that she was all right, they drove off. Thirty minutes later, a car exploded and burned in a Pasadena residential area. Seconds before the explosion, a neighbor heard apparent gun shots and someone shouting; "Let's get out of here." When the fire department finally got the fire extinguished, Lacey's badly burnt body was found in the trunk. She had third degree burns to 90% of body, a gunshot wound to the hand, and bruising to the neck indicating compression prior to death. The cause of death was smoke inhalation, burns, and suffocation, indicating that she had been burned alive. The car was set on fire by someone dousing the passenger area with gasoline and lighting it. A gun and money were found on the ground next to the vehicle. Soon thereafter, information was provided to Pasadena Police Department investigators that defendant's sister-in-law, Margaret Williams, knew something about the murder. Margaret, having an outstanding arrest warrant, was arrested and questioned. At trial, she testified (under a grant of immunity) that defendant and Loretta Kelly, a friend of defendant's, had come over to her house in the early morning hours of March 21. Defendant's hand and ankle were burnt, and he smelled of gasoline. When asked what happened, defendant said that he had "robbed a bitch" and that he'd "burnt the bitch up." He'd apparently had a fender-bender accident with Lacey in the Boys Market parking lot (as evidenced by paint transfers between his and her vehicles) and when she said she was going to call the police, he instead kidnapped her at gunpoint. Defendant was arrested shortly thereafter. Interrogated by Pasadena detectives four times over three days, defendant eventually provided a near-confession connecting him to Lacey's kidnapping, robbery, and murder. Charged with first degree murder with special circumstances, defendant filed a motion to suppress his statements. The trial court denied defendant's motion and allowed his statements into evidence against him. Defendant was convicted of first degree murder with various special circumstances being found to be true. He was sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. (1) Need for a Clear and Unequivocal Invocation: Defendant's primary contention was that his *Miranda* rights had been violated in the first of the four interviews and that this poisoned everything after that. As a part of the standard *Miranda* admonition, defendant was asked in the first interview for an express wavier of his right to remain silent ("Yeah"), and then, separately; "Do you wish to give up the right to speak with an attorney and have him present during

questioning?" This apparently confused defendant because he then said; "You talking about now?" The detective then said; "Do you want an attorney here while you talk to us?" Defendant answered; "Yeah." Detective: "Yes you do?" Defendant: "Uh huh." Detective: "Are you sure?" Defendant: "Yes." Detective: "You don't want to talk to us right now." Defendant: "Yeah, I'll talk to you right now." Detective: "Without an attorney." Defendant: "Yeah." In clarification, the detective explained that if he wanted to wait until Monday (two days later), they'd send over a public defender or he could talk to his own attorney. Defendant responded adamantly that he didn't want to wait until Monday, that he wanted to talk right then, and that he freely gave up his right to have an attorney present. The Court found that this showed that defendant had made a knowing and voluntary waiver of his rights under *Miranda*. The Court was satisfied that once the question whether counsel would be provided immediately had been resolved, defendant didn't have the slightest doubt that he wished to waive his right to counsel and commence the interrogation. In response to defendant's argument that the officers should have immediately ceased the interrogation when defendant first asked to have an attorney present, the Court noted that defendant's request, under the circumstances, was not clear and unequivocal. The officers had the right to seek clarification. The primary issue is whether a reasonable officer would have understood defendant to be invoking his right to counsel. Here, it is apparent that there was no such understanding. "In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that in context it would not be clear to the reasonable listener what the defendant intends." Also, asking defendant for clarification of what he really wanted is not badgering under these circumstances. Later during this first interrogation, when one of the detectives openly accused defendant of killing Lacey, defendant finally said: "I want to see my attorney 'cause you're all bullshitting now." Defendant argues that this was a clear and unequivocal invocation. The Court again disagreed. When defendant made this statement, one of the detectives responded with, "You want your attorney now?" Defendant responded simply that he didn't want to talk to the detective who accused him of killing the victim but that he'd talk to the other detective. Once a defendant has waived his right to counsel, any change of heart must be clear and unequivocal. Here, defendant was merely expressing his frustration with the one detective who was accusing him of murder. It was "game playing" on the defendant's part and not an unambiguous invocation of his right to counsel. Towards the end of the first interview, when asked how he'd met the victim on that day, defendant finally responded, "I don't want to talk about it." The Court held that this again was merely defendant's frustration with the subject at hand. Contrary to defendant's argument, refusing to talk about one topic is not an invocation of one's right to silence. (2) Successive Interrogations: Defendant next argued that he should have been readvised prior to initiation of the second interview that occurred two days after the first. However, "readvisement prior to continued custodial interrogation is unnecessary so long as a proper warning has been given, and 'the subsequent interrogation is "reasonably contemporaneous" with the prior knowing and intelligent waiver.'" Whether a suspect must be readvised before a subsequent interview may proceed depends upon various circumstances including: (a) the amount of time that has elapsed since the first waiver; (b) changes in the identity of the interrogating officer and the location of the interrogation; (c) any reminder of the prior advisement; (d) the suspect's experience with the criminal justice system; and (e) "[other] indicia that the defendant subjectively underst[ood] and waive[d] his rights." Under the circumstances of this case, the detectives were not required to readvise defendant of his rights at the second interview. There was only 40 hours between interviews. The same interrogators were involved at the same location. Also, defendant was experienced in the criminal justice system and expressed no reluctance to talk with the detectives again. (3) Involuntariness: Lastly, defendant argued that his incriminating statements were coerced in that he was threatened with the death penalty and told that he would be "better off if he told the truth;" i.e., that a jury is not going to have any sympathy for him if he does not tell the truth. In assessing allegedly coercive police tactics, "[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." In this case, defendant was openly told that unless he told the truth, the jury was going to "send (him) to the gas chamber." Despite these threats, defendant continued to deny the crime. Also, none of the ploys used by the detectives, such as lying to defendant about evidence (eyewitnesses) they didn't really have, were the type of deception that would have made his resulting confession unreliable. Further, telling defendant that he may not have been the actual killer, or have intended the victim's death, is a permissible form of interrogation. Suggesting possible alternative

explanations in the hope that the defendant will supply further details is not coercion. And telling defendant that a jury may be more impressed with a confession and a showing of remorse than with a defendant who lies is also permissible. "Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth." It wasn't until the end of the fourth interview that defendant finally decided to admit to kidnapping, robbing, and taking part (with his co-defendant) in Lacey's murder. When asked why he finally decided to admit his guilt, defendant responded; "'cause it's bothering my brain." In actuality, it appeared that his eventual confession was the result of him realizing that they had enough evidence to convict him and that it was then to his own benefit to cooperate. The Court agreed with the trial judge that none of these interrogation tactics were the cause of defendant's decision to confess. "Once a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect." The detectives here did no more than this.

NOTE: In this case there was a lot of discussion about the death penalty. Be careful with such comments. It is an impermissible threat that will result in suppression of the statement if an officer tells a suspect that he will be charged with a death penalty offense because of his failure to cooperate or that the prosecutor or judge will abandon the death penalty theory of the case only if the suspect confesses. (See *People v. Cahill* (1994) 22 Cal.App.4th 296, 314; see also *People v. Nicholas* (1980) 112 Cal.App.3d 249, 266--telling a suspect that the "death penalty went back in today, did you know that?" was an implied threat.) On the other hand, the mere mention of the death penalty will not automatically invalidate a confession. (*People v. Holloway* (2004) 33 Cal.4th 96, 112-117--saying "we're talking about a death penalty case here" was not a threat; see also *United States v. Haswood* (9th Cir. 2003) 350 F.3d 1024, 1029--it is not coercive to accurately inform a suspect that lying could result in additional charges or a lengthier sentence.) Defendant made other claims that were not supported by the record. He argued, for instance, that his ultimate confession was caused by being held incommunicado for three days and being subjected to prolonged interrogations. However, there was nothing in the record supporting his claim that he had been held incommunicado. And his four interrogations, none of which lasted more than half an hour, were broken up by long periods of no questioning. This case is a good read for anyone wanting to be an effective interrogator because it discusses what is and is not legally permissible in an interrogation.

NOTES:

People v. Bacon

(2010) 50 Cal.4th 1082

RULE: An attempt to invoke one's *Miranda* right to counsel must be unequivocal and unambiguous to be legally effective.

FACTS: CHP officers found a car registered to Charles and Deborah Sammons stuck in the mud and abandoned on the edge of a slough in Solano County. While preparing to impound the car, the trunk was checked. Deborah Sammons' bloodied and mutilated body was found inside. A later autopsy revealed that she had been strangled and beaten. She had also been stabbed in the face and the side of her chest, penetrating her heart and lungs. She had no underclothing under her blouse and skirt. In a later autopsy, sperm was recovered from Deborah's vagina. An examination of the victim revealed minor trauma to her vaginal opening and more severe trauma to her anal cavity. The next day, Solano County Sheriffs Deputies went to Charlie Sammons Vacaville home to notify him of his estranged wife's death. Charlie and Deborah had been separated for about a month with Deborah living elsewhere. Concerned with Charlie's reaction (or lack thereof), the officers asked him if he was involved in her death. Charlie responded; "Not quite." Based upon this unusual answer, the deputies asked Charlie for permission to search his house. He agreed. A couple drops of blood were found on the washing machine. The deputies asked Charlie to accompany them to the station for questioning. But when Charlie started to put on his tennis shoes, the deputies noticed what appeared to be blood on them. The shoes were seized. DNA testing later revealed this blood to be Deborah's. After Charlie's arrest, a search warrant was obtained which resulted in the discovery of Deborah's blood in numerous places in the master bedroom and the living room. The remnants to a bra were found in the fireplace. A single-edged, wood-handled steak knife, fitting the pattern of the stab wounds, was recovered from the dishwasher. In an interview, Charlie's statements to the officers led to defendant's arrest and a search of his residence, where a tire iron was recovered. An expert later testified that the tire iron "matched very nicely" with the peculiar bruises to Deborah's face. Also, the sperm recovered from Deborah's body was determined through DNA to be defendant's. Defendant was arrested the same day as Charlie and interrogated by Solano County Sheriff's Detective Patrick Grate. Defendant was read his *Miranda* rights and agreed to talk. Although defendant first denied ever having met Deborah, he soon admitted to being at Charlie's house the evening she was killed but claimed that Charlie did the crime. He also admitted to having had sex with her that night but claimed that it was consensual. As the interrogation progressed, he eventually admitted to having been solicited by Charlie to kill his wife but denied that he followed through with the plan. Defendant claimed that Charlie actually killed her but that he helped dispose of her body. Thirty minutes into his interrogation, before making any significant admissions, defendant told Deputy Grate, "I think it'd probably be a good idea for me to get an attorney." Detective Grate responded, "Alright, it's up to you," and, "It's up to you if you, you know, if you want an attorney, I mean I'm, I'm giving you the opportunity to talk." But then defendant continued on by telling the detective to "talk to me," repeating this phrase three times. So the interrogation was continued. Both Charlie and defendant were later charged with murder with special circumstances. Scheduled for separate trials, defendant was tried first. Charlie testified against defendant and claimed that defendant committed the murder. His story was that Deborah had come over to the house to help pay the bills. When Deborah went into the bedroom to put away the receipts and checks, defendant raped and killed her. Defendant was convicted of first degree murder with special circumstances and sentenced to death. His appeal was automatic.

HELD: The California Supreme Court unanimously affirmed. Among the issues on appeal was defendant's contention that Detective Grate ignored his invocation for the assistance of an attorney in violation of

Miranda. Specifically, telling the detective that, "I think it'd probably be a good idea for me to get an attorney" was an invocation that should have terminated the interrogation. However, the United States Supreme Court has previously held that "an officer is not required to stop questioning a suspect when 'a suspect makes a reference to an attorney that is ambiguous or equivocal.'" (*Davis v. United States* (1994) 512 U.S. 452.) The high Court also held that the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Defendant argued that his comment about having an attorney was sufficiently clear that the detective should have recognized it as an invocation of his rights under *Miranda*. The Court disagreed noting that the words "I think," "probably," and "it'd" were ambiguous qualifying words. Considering the context of defendant's comment, and his telling the detective to talk to him three times, the Court found the reference to an attorney to be equivocal or ambiguous at best. Further, the Court disagreed with defendant's argument that Detective Grate's comment about ". . . giving you the opportunity to talk" constituted "badgering" calculated to get the defendant to continue with the interview. Lastly, the Court rejected defendant's argument that the rule of Davis had been overruled by the U.S. Supreme Court in *Dickerson v. United States* (2000) 530 U.S. 428. To the contrary, the Court noted that the U.S. Supreme Court has reaffirmed the Davis rule and extended it to ambiguous attempts to invoke one's right to silence, not just when a suspect asks for an attorney. (See *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S.Ct. 2250; 176 L.Ed.2d 1098], see this Reference Guide at page 82.) Defendant's statements were therefore properly admitted into evidence against him.

NOTE: The Court further cited the Davis decision as authority for the suggestion that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney." But, while encouraging an officer to seek for clarification, the Court has declined to adopt a rule that it is legally necessary to do so. The lesson here is to listen to the suspect's attempt to invoke, whether asking for an attorney or to remain silent. If it's ambiguous, the interrogation need not be terminated.

NOTES:

People v. Martinez

(2010) 47 Cal.4th 911

RULE: An invocation of one's right to silence and right to counsel, per *Miranda*, after an initial waiver, must be clear and unequivocal to be legally effective.

FACTS: At sometime between 10:30 and 11:00 p.m. on November 15, 1996, Sophia Torres was beaten to death in a park near where she was living in Santa Maria. In addition to numerous blunt force injuries to her body, she received a deep laceration on the side of her face that appeared to have been inflicted by a knife. Semen recovered from her dress and a vaginal swab was later connected to defendant through DNA testing. At 11:07 p.m., an anonymous 911 call came into the Santa Maria Police Department reporting that a woman was being attacked in Oakley Park by two heavy set black girls wielding baseball bats. When the dispatcher noted that the caller was calling from a phone booth blocks from the park, and asked why, the caller hung up. A Santa Maria police officer responded to Oakley Park and found Sophia's broken and bloodied body. Also noted were bicycle tire tracks in the wet grass. Two weeks earlier, Maria M. was assaulted by a male wielding a knife as she walked to work. He forced her into an alley and attempted to pull off her pants. A passerby interrupted the attack, and the male fled. Two weeks after Sophia's murder, Laura Z. was entering her car at a local shopping mall when she noticed a male running towards her car. She locked the doors before he could get to her. Failing to get the car's door open, the male eventually ran away. Two days later, on December 4, Sabrina P. was sitting on a bench at the same shopping mall waiting for her mother to pick her up. A male sat down next to her and put a knife to her side, telling her not to scream or he'd stab her. He told her to come with him, but she refused. She then grabbed the handle of his knife and refused to let go. Eventually, the male lost the tug-of-war over the knife and walked away. Sabrina ran to a nearby restaurant and called police. Responding officers found defendant riding a bicycle on a street nearby and detained him. After Sabrina made a positive curbstone identification, defendant was arrested and transported to the police station. Maria M and Laura Z. both subsequently positively identified defendant from a photographic lineup. At the station, the arresting officer advised defendant of his *Miranda* rights and obtained a waiver. Defendant denied that he had assaulted Sabrina P. About ten minutes into the interrogation, in response to the officer's question about why Sabrina would identify him, defendant responded; "That's all I can tell you." The interrogation was ended. The next morning (December 5), two detectives, unaware of defendant's prior comment that "That's all I can tell you," brought him to an interview room and asked him if he remembered being advised of his rights the night before, whether he still understood them, and whether he still wanted to talk with them. Defendant answered each question affirmatively. They questioned him briefly about the assault on Sabrina P., to see if his voice matched the voice on the anonymous 911 call just after Torres's murder, and then after a break to compare his voice with the 911 caller's voice, they questioned him about Torres's murder. Defendant admitted to making the 911 call but denied being Torres's killer. At the end of the interview, after the detectives told defendant they were taking a break, defendant told theme, "I don't want to talk anymore right now." That same evening the detectives took defendant to have a SART exam completed. He was asked at that time to repeat his story about the two female attackers, which he did. Back at the station, he was interrogated for another 30 to 45 minutes. At the end of this session, defendant was asked if he would take a polygraph exam. Defendant responded with; "I think I should talk to a lawyer before I decide to take a polygraph." The next morning (December 6), detectives asked defendant if he would mind talking to them again. He said "no," he wouldn't mind. During this session, defendant admitted to assaulting Sabrina P. and Maria M., but continued to deny that he'd killed Torres or that he'd been involved in the incident with Laura Z. Charged

with capital murder and other offenses, defendant made a motion to suppress all his statements to police, arguing that his attempts to invoke *Miranda* had been ignored. The trial court denied his motion. Defendant was convicted of first degree murder with special circumstances (plus other charges) and sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. On appeal, defendant renewed his arguments concerning his attempts to invoke his right to silence and to an attorney. The Supreme Court rejected these arguments, noting that in attempting to invoke one's "right to the assistance of counsel," "a suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." And although it would be a good idea for officers to stop and clarify an ambiguous attempt at invocation, there is no legal requirement that they do so. The Court also noted that until the U.S. Supreme Court rules on this issue, California has applied the same rule, including the lack of any legal need to seek clarification, to ambiguous attempts to invoke one's "right to silence." (See *Berghuis v. Thompkins* (2010) 560 U.S. __ [130 S.Ct. 2250; 176 L.Ed.2d 1098], where the U.S. Supreme Court later in the year did in fact rule accordingly, see this Reference Guide at page 82.) Defendant argued that a "stop and clarify" rule should apply to an ambiguous attempt to invoke one's right to silence because this right is "the core right *Miranda* sought to protect." The right to counsel is merely a "'second layer' *Miranda* protection." The Court rejected this argument, noting that such a rule would be too difficult to apply, particularly when a suspect asks for something resembling a combination of both (e.g., "Maybe I should stop talking and get a lawyer.") With these principles in mind, the Court found that defendant's comment on the first evening (Dec. 4) -- "That's all I can tell you" -- was ambiguous. Instead of being an invocation, it merely let the officer know that defendant didn't have any more info regarding the victim's accusations. Even though the court found that there was no invocation, it went on to discuss factors important to finding reinterrogation proper after an invocation. Assuming defendant had invoked, reinterrogation was proper here because: (1) the officer who first spoke to defendant immediately stopped questioning after he allegedly invoked; (2) the overnight time gap between two interviews was significant; (3) even though they didn't reread his rights, detectives reminded defendant of the admonition from night before; (4) detectives asked defendant if he wanted to talk and he said he did; (5) the detectives' questioning during the second interview quickly shifted from the assault that the officer had asked about the night before to the murder of a different victim; and (6) the detectives did not know about defendant's alleged invocation the night before. Reinitiating an interrogation under these circumstances, where an invocation to one's right to silence was the issue, has been approved by the U.S. Supreme Court. (See *Michigan v. Mosley* (1975) 423 U.S. 96.) The court also found defendant's second statement at the end of the December 5th interview -- "I don't want to talk anymore right now" -- was not an attempt to invoke, but rather an indication that he didn't want to talk anymore at that time. The interrogation was in fact terminated at that time with the detective suggesting to defendant that he "think about it" and that they were taking a break anyway. Had defendant intended a permanent invocation, he could have said so at that time. He did not. Lastly, the court also found ambiguous defendant's statement, at the end of the last questioning period on December 5, that he wanted to talk to a lawyer before agreeing to a polygraph examination. "[A] defendant does not unambiguously invoke his right to counsel when he makes that request contingent on an event that has not occurred." Since no polygraph exam was ever done, defendant's request to talk to an attorney first never ripened. Based upon this, defendant's motion to suppress his statements was properly denied by the trial court.

NOTE: The Supreme Court noted that these ambiguity rules apply to the situation where a suspect has already waived and an interrogation is underway, and the suspect then changes his mind and attempts to invoke mid-interrogation. (E.g., "In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must unambiguously' assert his right to silence. . . .") If the suspect had just been advised of his rights and the circumstances had been a little different, the result might also have been different. (See *People v. Peracchi* (2001) 86 Cal.App.4th 353,

361 ["I don't want to discuss it right now" preceded by similar comments and said immediately following *Miranda* advisements was an invocation].)

NOTES:

People v. Gamache

(2010) 48 Cal.4th 347

RULE: (1) A defendant who invokes his rights pursuant to *Miranda* may reinitiate questioning by showing a clear willingness and intention to talk about his case. (2) Incriminating statements made during a suspect's "small talk" with a law enforcement officer that are not the product of an interrogation are admissible.

FACTS: Eighteen-year-old defendant, just released from the Army, returned to San Bernardino County to reconcile with his estranged wife, Tammy. The two of them moved in with Thomas P. (a minor) in Yermo while they decided what they were going to do with their lives. Tammy knew a couple, Lee and Peggy Williams, who had horses, a horse trailer, and a motorhome; everything the Gamaches needed to start their new lives. With another acquaintance, Andre Ramnanan, they planned to take the Williams's horses and other property and to shoot the victims if they gave them any trouble. At about 11:00 p.m. on the evening of December 3, 1992, Lee and Peggy Williams were woken up by someone knocking on their door. When Lee opened the door, defendant, Tammy, Ramnanan, and Thomas P. burst in with guns. Defendant and his companions looted the house of personal belonging, cash, and firearms, and took the keys to their motorhome, car and truck. With the Williams's horses loaded into their trailer and hooked up to their truck, they took the Williams out to their motorhome where they were bound and gagged. After forcing the Williams to sign bills of sale for the vehicles, defendant and Ramnanan drove them in the motorhome out into the desert where defendant shot them both. Prior to shooting each of them in the head, defendant told them; "Thank you and have a nice day." After checking Peggy's pulse, he shot her a second time. Defendant and Ramnanan then left. Lee was dead but Peggy survived and remained conscious. When she was sure they were gone, she walked to a nearby truck stop and called police. Within an hour, the police located the motorhome in a café parking lot. Defendant and Tammy returned to the motorhome shortly before 5:00 a.m. driving the Williams's pickup truck. They were arrested. The murder weapon and other things taken from the Williams were recovered. Ramnanan was arrested shortly thereafter and the Williams's car was recovered. Thomas P.'s house was searched and bloody clothing and more of the Williams's possessions were recovered. Shortly after being arrested on December 4, defendant was questioned by Detective Tom Bradford. Defendant waived his rights and agreed to answer questions, but denied his crimes. When asked if he'd take a polygraph, defendant replied; "OK, I do think before I take the polygraph I would like to talk to an attorney and just make sure. … I'd like to know what is going on before I answer any more questions." So questioning was ended. While walking defendant back to his cell, defendant asked about Tammy. Bradford told him that she was okay, but that she was going to jail for murder and that she and Ramnanan had given him up. Detective Bradford later testified that this statement was untrue but was not intended to elicit a response. Upon reaching the booking area, defendant told Bradford that he'd changed his mind, that he was only trying to protect Tammy and Ramnanan, but that he now wanted to talk. Reminded that he'd just asked for an attorney, defendant insisted on reinitiating the interview. Defendant then confessed to everything except for being the shooter, a fact he admitted later that morning to a polygraph examiner. The trial court later found defendant's above request for an attorney to be a legally effective invocation of his right to counsel, making all statements provided to Bradford and the polygraph examiner to be inadmissible. However, that afternoon, defendant summoned Detective Bradford to his cell and tried to convince him that Tammy didn't know anyone would be killed. During this conversation, defendant agreed to participate in a joint interview. As a result, shortly thereafter, defendant, Tammy and Ramnanan were all interviewed together after each again waived their *Miranda* rights. Defendant confessed to their crimes in detail, including to being the shooter. Based upon defendant's reinitiation of his contact with Detective Bradford, the trial court found this confession, and all defendant's subsequent statements, to be admissible. That evening, defendant waived his *Miranda* rights yet a third

time and participated in a reenactment of the crimes. The next day (December 5), while being booked by Deputy Ells, the deputy initiated some small talk with him about being in the Army. During this conversation, defendant volunteered that he'd "f__ed up. I knew better. I should have used a .45." Defendant continued: "I shot her once. I saw her eyes flutter. I shot her again in the back of the head. I know the skull is thicker back there." When asked how he felt about shooting the Williams, defendant responded; "I almost got an erection." He also talked about how he knew Lee Williams was dead because "the blood came out of his head like you turned on a faucet." Two days later (December 7), the three defendants were again interviewed jointly. After they were all reminded that they'd been advised of their *Miranda* rights, agreed that they understood those rights, and that they all still wished to waiver those rights, each completely confessed, describing their crimes in detail. This interview was videotaped with the video admitted into evidence at the penalty phase of their trial. Defendant, Tammy, and Ramnanan were jointly tried for first degree murder with special circumstances and attempted murder, along with other lesser charges. Convicted with the special circumstances found to be true as to each, Tammy and Ramnanan were both sentenced to life without parole. Defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. (1) On appeal, defendant first argued that once he'd invoked his right to the assistance of counsel, he was protected from any further interrogations and that all his subsequent incriminatory statements should have been suppressed. The Supreme Court assumed, without discussion or argument, that when defendant asked for an attorney ("I do think before I take the polygraph I would like to talk to an attorney and just make sure. … I'd like to know what is going on before I answer any more questions."), he had effectively invoked his *Miranda* rights and was thereafter off limits for further questioning absent the presence of counsel or he, himself, reinitiating questioning. The trial court suppressed defendant's statements to Detective Bradford made in the first interview that morning (as well as, presumably, defendant's statements to the polygraph examiner), a conclusion with which the Supreme Court inferably agreed. However, that afternoon, when defendant summoned the detective to his cell and demonstrated his obvious intent to discuss Tammy's degree of participation, defendant showed a clear willingness and intention to talk about the case that was sufficient to satisfy the legal requirements for reinitiating an interrogation after a previous invocation. This willingness was again displayed when he waived his *Miranda* rights prior to the first joint interrogation done 30 minutes later. It is a rule of law that a defendant who invokes may reinitiate questioning so long it is done on his own initiative. Defendant here did just that, rendering all statements elicited during the various interrogations after that point admissible. (2) Defendant also challenged the admissibility of his statements to Deputy Ells. The Court ruled, however, that even though in custody, defendant's statements to the deputy were not the product of an interrogation. An "(i)nterrogation consists of express questioning, or words or actions on the part of the police that are reasonably likely to elicit an incriminating response from the suspect." An interrogation refers to questioning initiated by the police or its functional equivalent. It does not include casual conversations. Volunteered statements don't count. Per the Court, "smalltalk (sic) is permitted." The Court found that there was no reason to think that Deputy Ells's "small talk" about defendant's military service would lead to the incriminatory statements defendant thereafter volunteered. Also, the deputy's subsequent "neutral questions" did not convert the conversation into an interrogation. Defendant's statements to the booking deputy, therefore, were admissible in evidence.

NOTE: The trial court ruled, and no one on appeal disputed, that defendant had effectively invoked his right to counsel when he said he wanted to talk to a lawyer before agreeing to a polygraph. (See *People v. Martinez* (2010) 47 Cal.4th 911, 952 [in this Reference Guide at page 91].)

NOTES:

People v. Lessie

(2010) 47 Cal.4th 1152

RULE: A minor asking to speak with his father is not a per se *Miranda* invocation. The test for determining whether such a request is intended to be a Fifth Amendment invocation is based upon a consideration of the totality of the circumstances.

FACTS: Sixteen-year-old defendant was an admitted gang member want-to-be. A runaway from his father's home in Vista, he openly associated with Oceanside gangs affiliated with the Crips. In particular, defendant was getting his gang training from a gangster named James Turner, aka "Black Jack." According to defendant's later confession, Turner took him to a pre-planned confrontation with Rusty Seau (former Charger/Patriot linesman Junior Seau's cousin) to settle a dispute over some sort of slight given earlier that day. On the way, Turner gave defendant a pistol, telling him he "better shoot." Defendant described this as a sort of initiation into the gang, and that he believed he would be beaten or killed if he didn't comply. Seau and a companion were located, but they declined to fight. After Seau mocked Turner's gang affiliation, Turner attacked him. As Seau attempted to run away, Turner shouted at defendant to shoot. He did so, hitting Seau in the back and killing him. Defendant was arrested at his aunt and uncle's house in Hemet two and a half months later. Oceanside Police Department Detective Kelly Deveney spoke to defendant about a half hour later, telling him he was under arrest on a juvenile detention order; and that upon arrival at the Oceanside P.D. headquarters (an hour and a half away), he could make as many phone calls as he wished. Asked if there was anyone other than his aunt and uncle that he wished to notify, defendant said that he'd like to call his father, but that he didn't know the number. At the station, defendant was given breakfast and then questioned. After some small talk, Detective Deveney told defendant that she had his father's phone number and asked whether officers should call him. Defendant answered that he wanted to call his father himself. Deveney's response: "Okay. So in the meantime, . . ." She then proceeded to give defendant his *Miranda* rights, asking him after each separate admonition whether he understood his rights. Defendant said that he did. Without an express waiver, Deveney questioned him about the murder of Rusty Seau. Defendant initially denied being involved but eventually admitted to being the shooter. Near the end of the interrogation, defendant was again asked if he wished to call his father, to which he said he did. But he was again put off while more questions were asked. He was later questioned a second time in Juvenile Hall and confessed a second time. Tried as an adult, defendant made a motion to suppress his confessions arguing that per California Supreme Court authority (*People v. Burton* (1971) 6 Cal.3d 375), defendant's request to call his father constituted an invocation of his rights under *Miranda*. The trial court denied defendant's motion ruling that Burton was no longer good law, and that under the circumstances, defendant's request to call his father was not intended to be an invocation of his Fifth Amendment rights. Convicted of second degree murder, defendant's conviction was affirmed by the Fourth District Court of Appeal. Defendant petitioned to the California Supreme Court.

HELD: The California Supreme Court unanimously affirmed. The Court noted that it had in fact ruled in *Burton* that a juvenile's request for a parent was presumed to be an invocation of his Fifth Amendment self-incrimination rights. The Court further noted that it was true that *Burton* had never specifically been overruled. But the Court further pointed out that eleven years after *Burton*, the California Voters passed Proposition 8, the "Truth in Evidence" initiative, amending the California's Constitution to, in effect, eliminate any exclusionary rules that are not based upon the federal Constitution. So whenever the U.S. Supreme Court interprets the Fourth or Fifth Amendments differently than California has, the California rule must fall. Subsequent to *Burton*, the U.S. Supreme Court decided *Fare v. Michael C.* (1979) 442 U.S. 707. In *Michael C*., the High Court ruled that a juvenile asking for his probation officer was not an effective

invocation of his Fifth Amendment rights. While *Michael C*. did not specifically overrule *Burton*, it did note that only a request for an attorney constitutes a "per se" (i.e. automatic) invocation of a suspect's Fifth Amendment privilege. The Court further noted that whether or not a request for a probation officer, "or his parents," is an invocation of his right to remain silent depends upon an evaluation of the totality of the circumstances. This includes a consideration of the juvenile's age, experience, education, background, and intelligence, as well as his capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. In this case, defendant said that he understood each of his rights. He had been through the criminal justice system before. He was 16 years old, educated up through the 10th grade, and had worked in retail stores. Despite the lack of an express waiver, he never made any attempt to invoke his right to counsel or silence. And, consistent with the trial court's ruling, there was no indication that his various requests to talk with his father were because of any uncertainty as to what he was doing. Under those circumstances, the trial court did not abuse it's discretion in determining that defendant was not attempting to invoke his Fifth Amendment rights by asking to speak with his father.

NOTE: Since the decision in *Michael C*., some legal trainers may have been advising that a juvenile asking for a parent or other adult figure may simply be ignored, i.e. that it is not an invocation. The *Lessie* case shows that the rule is not nearly so blunt. Do not just ignore a juvenile's request to talk to mom, or dad, or his P.O., etc. Whether such a request is an invocation depends upon the circumstances: Does it appear that this particular juvenile is asking for help in understanding what is going on or what he or she should do? Is he asking for a parent because one of them is an attorney? The Court was also somewhat critical of the detective's failure to honor defendant's request to use the telephone. Welfare and Institutions Code section 627(b) mandates that: (1) officers advise a juvenile of his right to make two telephone calls; (2) he be allowed to make those calls; and (3) these mandates be accomplished within one hour after a juvenile is taken into custody except where physically impossible. The hour and a half ride to the station would excuse strict compliance in this case. But postponing his right to use the telephone until after the completion of the interrogation violated the section. While there is no suppression remedy, willfully failing to comply with section 627(b) is a misdemeanor.

NOTES:

Maryland v. Shatzer

(2010) 559 U.S.__ [130 S.Ct. 1213; __ L.Ed.2d __]

RULE: After a *Miranda* invocation of a suspect's right to counsel, the interrogation may be reinitiated following a 14-day break in custody. Returning a prison inmate, serving time on a prior conviction, to the general prison population is such a break in custody.

FACTS: In August. 2003, a detective from the Hagerstown, Maryland, Police Department visited defendant where he was serving time at a correctional institution for a prior child sexual abuse conviction. The detective asked to talk to defendant about new allegations that he had also sexually abused his own son. Although defendant initially waived his *Miranda* rights, he changed his mind and invoked his right to counsel upon discovering what the detective wanted to talk about. The interview was promptly ended, and the investigation subsequently terminated. Defendant was returned to the prison's general inmate population. In March, 2006, two and a half years later, Detective Paul Hoover of the same police department received additional details concerning defendant's molest of his son. After interviewing the then 8-year-old victim, Detective Hoover sought an interview with defendant. Defendant was again advised of his *Miranda* rights which he again waived. Although defendant admitted only to masturbating in front of his son, he agreed to submit to a polygraph examination which he subsequently failed. Upon being confronted with the results of the polygraph, defendant broke down and exclaimed, "I didn't force him. I didn't force him." He then invoked his right to counsel, terminating the interview. Defendant's admissions were used against him at trial resulting in his conviction. The Maryland Court of Appeals, however, reversed, holding that under *Edwards v. Arizona* (1981) 451 U.S. 477, any law enforcement-initiated interrogation after defendant's 2003 invocation of his right to counsel was forbidden so long as defendant remained in custody. With defendant remaining incarcerated between 2003 and the later interview in 2006, Detective Hoover's interview of defendant was in violation of *Edwards*. Per the Maryland Court, a return of defendant to prison's general population was insufficient to constitute a break in custody. Defendant's admissions to Hoover, therefore, should not have been admitted into evidence at his trial. The state appealed, and the U.S. Supreme Court granted certiorari.

HELD: The United States Supreme Court reversed, reinstating defendant's conviction. *Miranda v. Arizona* was decided for the purpose of protecting the in-custody criminal suspect from the inherent compelling pressures of an incommunicado interrogation in an unfamiliar police-dominated atmosphere. To accomplish this, the suspect in such a situation must be advised of his rights to silence and to the assistance of counsel. Should he invoke either of these rights, the interrogation must cease. In the case of an invocation of one's right to the assistance of counsel, the Supreme Court determined that a "second layer of prophylaxis" was required to further protect a defendant in such a situation. Specifically, pursuant to *Edwards v. Arizona*, once an in-custody suspect has indicated a preference for dealing with law enforcement only through a lawyer, "any subsequent waiver (of his right to counsel) that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." In other words, once the suspect has requested the assistance of counsel, until his lawyer is present, he is off limits to any further attempts by law enforcement to reinitiate the questioning. The purpose of this rule is to prevent law enforcement from taking advantage of "prolonged police custody" by wearing him down (i.e., "badgering" him) with repeated attempts to obtain a wavier. However, this presumption of involuntariness, as established by *Edwards*, goes away with a break in custody. Such a break in custody serves to relieve the pressures of continued custody while giving him the opportunity "to seek advice from an attorney, family members, and friends." Only after such a break in custody may law enforcement reinitiate questioning. With the pressure

thus relieved, the suspect, if taken into custody a second time, should fully understand that he may merely re-invoke if he still does not wish to talk with the officers. As to how long this break in custody must be, the Court declined to leave the issue for case-by-case determination and imposed a 14-day rule, giving a suspect plenty of time to "shake off any residual coercive effects of his prior custody" and to "reacclimate to his normal life." With the period between defendant's two interrogations in this case being 2½ years, the only issue is whether being returned to the general prison population qualifies as a break in *Miranda* custody. While noting that prison life itself is subject to many restrictions, the Court also found that a prisoner in such a situation (i.e., "lawful imprisonment imposed upon conviction of a crime") is not being subjected to repeated attempts at custodial interrogations, which is what *Miranda* was intended to address. Prison is where defendant lived his "normal life," at least for that time period. Because of "the vast differences between *Miranda* custody and incarceration pursuant to conviction," returning defendant to the general prison population was akin to the break in custody contemplated by *Edwards*. Detective Hoover's interrogation of defendant in this case, therefore, did not violate *Edwards*.

NOTE: The *Shatzer* 14-day rule clearly applies when an officer interviews a suspect in *Miranda* custody if previously he invoked his right to counsel in an earlier interview. However, the reach of this case is unclear in other factual contexts. Specifically, does the 14-day rule apply if the suspect is not in *Miranda* custody at the time of the subsequent interrogation? For example, assume that on Monday a suspect was arrested for murder and, after waiving his *Miranda* rights, was questioned. During the interview, the suspect said he wanted counsel and questioning ceased. The next day, Tuesday, the suspect made bail and was released from jail. Based on intelligence that the suspect was going to leave the state on Saturday, officers went to suspect's house on Friday, told him that he was free to leave and free not to answer questions, but asked if they could talk to him about the murder. The suspect agreed and confessed. Given that the officers did not wait 14 days to question the suspect after his request for counsel, will a court admit his confession? While this issue remains an open question, decisions of the United States Supreme Court, including Shatzer, clarify that the *Miranda* and *Edwards* rules "do not apply" when the suspect "is not in custody." (See, e.g., *Montejo v. Louisiana* (2009) __ U.S. __ [129 S.Ct. 2079, 2090; 173 L.Ed.2d 955]; see also *People v. Storm* (2002) 28 Cal.4th 1007, 1027.) In the above example, because the suspect was not in *Miranda* custody when officers went back to question him, the *Shatzer* 14-day rule should be irrelevant. That said, it is unknown what a court will do in this situation. Therefore, unless there is a really good reason to do otherwise, an officer should always wait at least 14 days to contact a suspect who previously invoked his right to counsel. If an officer believes he absolutely must contact a suspect before the 14 days have passed, take every precaution to make sure the second contact is noncustodial. On an unrelated point, since it was not at issue here, the Court did not discuss the applicability of the Sixth Amendment right to counsel. One's Sixth Amendment right to counsel, which attaches upon the filing of a criminal complaint (*People v. Viray* (2005) 134 Cal.App.4th 1186), prohibits any discussion about the case for which the suspect is charged. At issue in this case was the wholly different Fifth Amendment right to counsel, which applies when a suspect is in custody and being interrogated. The two rights have to be analyzed separately because they cover different situations. The Court also noted, by the way, that the "*Edwards* rule" (i.e., illegality of law enforcement reinitiating an interrogation after an invocation of one's Fifth Amendment right to counsel absent a break in custody) applies even though (1) the questioning is about a different case, (2) the questioning is conducted by a different law enforcement authority, and/or (3) the suspect has met with an attorney between the two interrogations.

NOTES:

People v. Hartsch

(2010) 49 Cal.4th 472

RULE: Once the Sixth Amendment right to counsel has attached, it is lawful to house an unwitting potential co-suspect into a charged defendant's jail cell to see what the two of them will talk about as long as the co-suspect knows nothing about the investigator's plan and is otherwise not a law enforcement agent.

FACTS: Eighteen-year-old defendant and his friend, Frank Castaneda, left a party during the early morning hours of June 14, 1995, to go target shooting in a nearby orange grove near the town of Highgrove, in Riverside County. With Castaneda driving a stolen Honda, and the drunk defendant sporting a stolen .22 caliber pistol, defendant took five shots at a house they passed because, according to defendant, he'd had problems with the family that lived there. When they got to the orange grove, they happened upon a pickup truck parked in the dark and which defendant decided to "jack." When defendant walked up to the truck, however, he discovered a couple asleep in it. A woman, Ellen Creque, sitting in the passenger seat, sat up and woke her male companion, Kenneth Gorman, who spoke angrily to defendant. Defendant fired his gun several times at Gorman as Creque screamed. Defendant shot into the truck several more times. He then returned to the car where Castaneda (according to his testimony) was wanting to leave. Defendant, however told him that "they're not dead yet" and reloaded his gun. He then returned to the truck and shot Creque and Gorman several more times. Gorman was shot a total of seven times; Creque 13. As they drove away, defendant complained that "the bitch didn't want to die." Two days later, defendant was seen by several people, including Castaneda, with 14-year-old Angelica Delgado (the younger sister of Castaneda's girl friend, Veronica). Defendant told them that he and Angelica were going to the orange grove to have sex, inviting Castaneda along. Castaneda declined, but Angelica seemed to be happy with this plan. After midnight that same evening, defendant showed up at Castaneda's house alone, showing off some jewelry but declining to say where he got it. The jewelry was later determined to be Angelica's. Angelica's body was found two days later in the orange grove, having been shot four times in the top of her head and once between the eyes. Shoe prints at both homicide scenes and numerous witnesses to defendant's bragging about the homicides eventually led investigators to him. All the homicides were also committed by the same .22 caliber pistol which was never recovered. Defendant was arrested and waived his *Miranda* rights. In an interview, he denied doing any of the murders. He did admit, however, to being at the orange grove the night of the Creque/Gorman murders and to having had a .22 caliber pistol but claimed that he sold it weeks earlier. Castaneda, meanwhile, had fled to Texas with Veronica in the stolen Honda. Arrested in Texas, he waived extradition back to California and cooperated, at least to some extent, with the investigators. He implicated defendant in the Creque/Gorman murders and, eventually, to Angelica's murder. After defendant was arraigned on murder charges, Castaneda was put by the investigators into the same jail cell as defendant where their conversations were recorded. The investigators' thinking on this was to see if Castaneda said anything to defendant that was inconsistent with what he had been telling them, and to see what defendant said about the murders, if anything. Castaneda was not told of this plan nor was he asked to ask defendant anything or given any other instructions. As a result, defendant made some incriminating statements to Castaneda which were used against him at trial. Convicted of three counts of first degree murder, the use of a firearm during the commission of each murder, and with a true finding as to a multiple murder special circumstance (plus one count of shooting at an inhabited dwelling), defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed. One of the issues defendant raised on appeal was the use of his taped incriminating statements made to Castaneda when the two of them were placed into the same jail cell. Defendant argued that this constituted a violation of his Sixth Amendment right to counsel under the U.S. Supreme Court decision of *Massiah v. United States* (1964) 377 U.S. 201, i.e., a so-called

"*Massiah* violation." *Massiah* held that it is a violation of a charged defendant's right to counsel when an undercover police informant questions him. The rule applies whether or not the defendant has been released from custody pending trial. To prevail on a *Massiah* claim, however, a defendant must show that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. "Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." Castaneda, in this case, would have to be shown to have acted as an agent of law enforcement. An agency relationship, however, does not exist when the informant acts on his own initiative, merely accepting information from the defendant, without being asked to do this and with no official promises, encouragement, or guidance. This preexisting relationship between the informant and the government, however, need not be explicit or formal, but may be inferred from evidence of the parties' behavior indicative of such an arrangement. Defendant argued that an investigator's comment to Castaneda while still in Texas that "my door is always open" was such an inferred arrangement. The Court, however, noted that when put into context (i.e., after Castaneda had first declined to talk with the investigators), the officer's comment to Castaneda was not intended to infer that he could help himself by acting as a police agent, but rather merely to cooperate by talking with the investigators. In this case, there was no indication at all, actual or inferred, that Castaneda acted as an agent of the police. As such, *Massiah* did not apply and the recorded statements between Castaneda and defendant in the jail cell were properly admitted into evidence against him.

NOTE: The main United States Supreme Court case on use of undercover agents is *United States v. Henry* (1980) 447 U.S. 264, which held that, "[e]ven if the [government] agent's statement that he did not intend that [the undercover agent] would take affirmative steps to secure incriminating information is accepted [in fact, the undercover agent was specifically instructed not to do so], he [the investigator] must have known that such propinquity likely would lead to that result." Therefore, even without questioning the defendant, an informant who "stimulates" conversation with the defendant for the purpose of attempting to elicit incriminating statements, as opposed to acting as a "mere listening post," may be violating the defendant's Sixth Amendment rights. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 458-459, analyzing the rule of *Henry*.) Unlike *Henry*, however, where the informant knew what the plan was and was being paid for his cooperation, Castenada did not know the plan and received nothing for his cooperation in the cell. Be very careful as an investigator not to do or say anything with the proposed cellmate that could be considered an encouragement to him or her to act as a government agent or to "stimulate" conversation about the crime under investigation. Sticking him into the cell with no instructions and in total ignorance of any investigative plan or scheme seems to be the best way to avoid a *Henry* problem.

NOTES:

People v. Jennings

(2010) 50 Cal.4th 616

RULE: Interrogating co-suspects together makes each of the respective suspect's admissions admissible in evidence against the other as "party" and "adoptive" admissions (E.C. §§ 1220, 1221).

FACTS: Defendant impregnated 14-year old Michelle when he was 29, and the two of them "ran away" together. Baby Arthur Jennings was prematurely born in November, 1989. From birth, he was raised by a succession of relatives until defendant and Michelle finally retrieved him from his half-sister in November, 1995, telling her that he and Michelle were settled down and ready to raise Arthur. Arthur weighed 64 pounds at that time. Within two weeks, defendant and Michelle began to abuse "the damn little brat" (a quote from Michelle). Friends and neighbors began to notice bruises and other signs of physical abuse with Arthur looking "whipped" and unhappy. Among Arthur's injuries were black eyes, bruises, and a serious burn to his hand, He appeared to be very thin and undernourished, weighing approximately 35 to 40 pounds by the beginning of February. On February 4, 1996, while Michelle was not home, defendant and Arthur were watching TV when a female neighbor stopped by for a visit. Defendant attempted to kiss her, but she put him off. Arthur apparently witnessed this. When Arthur wouldn't stay in his room, defendant grabbed him and struck him in the back of his head with a fireplace shovel, and then tossed him onto his bed. The neighbor left. Arthur died within an hour of this incident. Defendant and Michelle eventually tossed Arthur's body into a nearby desert mine shaft. They reported Arthur missing to the San Bernardino Sheriff's Department two days later claiming that he'd disappeared sometime during the night. When Arthur couldn't be found, his disappearance was treated as a homicide. Both defendant and Michelle were interviewed separately and both, independently, caved in and showed detectives where Arthur was dumped. Defendant and Michelle were then interviewed together where, after waiving their respective rights under *Miranda*, they detailed their abuse of Arthur. During this interrogation, defendant admitted to pushing, elbowing, kicking, shaking and hitting Arthur. Although denying that he wanted Arthur to die, he didn't deny attempting to suffocate him ("I don't know, maybe."). Defendant acknowledged giving Arthur the drug "Unisom," an over-the-counter sleep aid, as well as Vicodin and Valium; prescription painkillers. Michelle admitted that on the day Arthur died, at defendant's behest, she had given him Vicodin and sleeping pills. In defendant's initial interview, he'd claimed that Michelle did much of the abuse but changed his story in the joint interview when Michelle challenged him, exhorting him to tell the detectives the truth. After this, he took most of the blame himself. Defendant finally admitted that when Arthur saw him try to kiss the female neighbor, he knew that he would have to "finish (Arthur) off." He then admitted that he'd "probably" killed Arthur by "abusing him and the medication and stuff." Their trailer was later searched, resulting in the discovery of bloodstains throughout Arthur's bedroom. An autopsy showed that Arthur weighed 35 pounds when he died, was "severely emaciated and malnourished" with muscles that were "wasted," and had pneumonia. Arthur's injuries included numerous bruises as well as subdural hemorrhaging on the left side of his head and behind his eyes. In his blood were found three nervous system depressants with enough Unisom to cause seizures and cessation of breathing. Lesser amounts of Vicodin and Valium, also found in his blood, would have added to the depressive effects of the Unisom. The cause of death, per the pathologist, was "the entire problem," i.e., the drugs, the physical injuries (both "chronic" [old] and "acute" [occurring shortly before death]), and the malnutrition and emaciation—"all working together." Defendant and Michelle were charged with first degree murder with special circumstances. Prior to trial, defendant made a motion to sever their cases and be tried separately. The prosecution told the court, however, that they intended to introduce only the two defendants' statements made during the joint interview. The trial court denied the motion to sever. Defendant was convicted of first degree murder with the special circumstance of the use of torture. Sentenced to death, his appeal was

automatic. Michelle was convicted of first degree murder only and sentenced to 25-years-to life, with the possibility of parole. Defendant's appeal to the California Supreme Court was automatic. (Michelle's appeal was litigated separately. See *People v. Jennings* (2003) 112 Cal.App.4th 459, disapproved in part by *People v. Jennings* (2010) 50 Cal.4th 616, 664, fn. 17.)

HELD: The California Supreme Court unanimously affirmed. On appeal, defendant argued that allowing into evidence testimony concerning Michelle's statements to the investigators that she made during their joint interrogation violated his Sixth Amendment right to confrontation. During the joint interrogation, both defendant and Michelle contributed their respective versions, each confronting the other when they disagreed. The net result of this interview was that they both admitted to being abusive towards Arthur, at different times, but that defendant committed most of the abuse. Contradicting much of his own original statement blaming Michelle, he eventually admitted to much of the abuse that Michelle claimed that he had committed. The Court ruled that the evidence of Michelle's statements accusing defendant of different abusive acts to which he then admitted was admissible. Under the Evidence Code, Michelle's statements were admissible against defendant as "party admissions" (E.C. § 1220), as well as "adoptive admissions" (E.C. § 1221); exceptions to the "hearsay rule." What this means is that everything Michelle said about defendant's acts, while defendant was present and which he heard, understood, and had the opportunity to deny or contradict, were admissible against him just as if he had said them himself. "His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." In other words, a suspect, such as defendant in this situation, who remains silent, makes equivocal responses, or admits, during a joint interrogation will be held to, in effect, have made those incriminating statements himself. One's constitutional right to confront his accusers under the Sixth Amendment is inapplicable when the accuser is, in effect, himself. As such, the Court found that the joint interrogation technique as used here can result in statements that are admissible at trial against the other involved party without violating either defendant's Sixth Amendment right to confrontation, as protected by a number of state and federal Supreme Court decisions. (See, e.g., *Crawford v. Washington* (2004) 541 U.S. 36; *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.) Michelle's statements made during their joint interrogation were therefore properly admitted into evidence against defendant.

NOTE: This case cites with approval the lower appellate court decision of *People v. Castille* (2005) 129 Cal.App.4th 863, where this same interrogation technique was used. Had the officers in this case not done a joint interrogation, each defendant would likely have been tried separately, doubling the time and effort it would have taken to obtain the same two convictions. The facts of this interrogation show that, not only did the joint interrogation make each defendant's incriminatory statements admissible against the other, but it also caused the two defendants to talk even more about their respective abusive acts than they otherwise might have. Investigators (and serious patrol officers) should seriously think about using this interrogation technique. Note, however, that any of one party's statements that the other party does in fact deny do not come within this rule and will have to be redacted before the jury hears the evidence. That was the finding of the appellate court in Michelle's appeal. Redacting is possible when necessary. So that's not anything with which a police interrogator really needs to be overly concerned and shouldn't cause an investigator to avoid doing joint interrogations.

NOTES:

Mickey v. Ayers

(9th Cir. 2010) 606 F.3d 1223

RULE: Incriminating statements made to police by an in-custody suspect during "casual conversation," so long as not solicited, are admissible. A suspect showing his inclination to want to talk may, depending upon the circumstances, allow for a second attempt to seek a *Miranda* waiver after a prior invocation of the suspect's right to counsel.

FACTS: During the evening of September 28, 1980, defendant brutally murdered Eric Lee Hanson and Hanson's girlfriend, Catherine Blount, in their home in Placer County. Defendant and Hanson, who was a dope dealer, were actually friends. Defendant's motive to kill Hanson was related to his belief that Hanson had stolen some of his money. At that same time, defendant had stolen some of Hanson's marijuana crop and buried it for later use. Defendant had traveled from Japan, where he lived with his wife, who was a nurse, and her two children, on an Air Force base. He was unemployed and they needed money. After killing Hanson, the plan (which was never completed) was to go to Alaska where he would kill his wife's ex-husband so they could collect on an insurance policy for which defendant's wife was the beneficiary. After killing Hanson and Blount and stealing their car and some personal belongings, defendant was picked up by a friend at a prearranged rendezvous point. Upon abandoning Hanson's car and stashing some of the stolen property, defendant flew back to Japan. An investigation quickly led to defendant's friend which in turn, with a grant of immunity, led to defendant. On October 14, 1980, Placer County Sheriff Donald Nunes traveled to Japan and arrested defendant. He was advised of his *Miranda* rights but declined to speak at that time, telling Nunes that he first wished to speak to a friend who was an attorney. Although defendant wanted to waive extradition, Japan was not ready to let him go. It wasn't until January 12, 1981, that Nunes returned with Detective Curtis Landry, a federal marshal, and an extradition warrant. On January 16, at about 3:30 p.m. Tokyo time, they picked defendant up and began their journey back to California. During the three-hour car ride to the airport, defendant was alert, healthy, jovial, and talkative, initiating and engaging in small talk with Nunes. At 8:00 p.m. Tokyo time, Detective Landry offered defendant, who had bad breath, a breath mint that he'd obtained from a candy bowl in defendant's wife's home during a previous interview with her. When defendant appeared to recognize the mint, Detective Landry asked him if he knew where it came from. Defendant said that he did, and put his head in his hands. On the flight to Hawaii, defendant continued to initiate small talk with Nunes. After Landry switched seats with Nunes so Nunes could get some sleep, defendant continued his small talk with Landry. About two hours later, defendant suddenly asked Landry whether Hanson and Blount were buried together. When told that they'd been cremated and their ashes scattered, defendant began to cry uncontrollably. He told Landry that nothing would have happened if Hanson had not reacted as he had to the news of defendant's theft of Hanson's marijuana crop. This outburst lasted about 20 minutes with Landry saying nothing. About an hour later, defendant resumed his generalized small talk with Landry. The plane landed in Hawaii at 1:30 a.m. Tokyo time (a 5½ hour flight). Before taking defendant to a Hawaii jail, defendant told Landry; "Curt, I would like to continue our conversation at a later time." Landry replied; "Fine, yes." The officers then called the Placer County District Attorney's Office for advice and were told to ask defendant if he wished to speak and if so, Mirandize and question him. Landry did so some six hours later. Defendant confirmed that he'd requested this conversation and waived his *Miranda* rights. During the following four-hour interrogation, defendant was alert and aware. His composure came and went several times as he made a number of incriminating statements. They resumed their flight the next day to California where defendant was finally booked. He was convicted of two counts of first degree murder with special circumstances and, following the penalty phase, sentenced to death. In an automatic appeal to the California Supreme Court defendant's conviction and penalty were affirmed. (*People v. Mickey* (1991) 54 Cal.3d 612.) In its

affirmation, the Supreme Court upheld the admissibility of defendant's in-flight and Hawaii admissions, citing the lack of any coercion. The United States Supreme Court denied certiorari. (*Mickey v. California* (1992) 506 U.S. 819.) Defendant then began pursuing federal habeas corpus relief which included the issues discussed below. The federal district court made a mixed ruling concerning the voluntariness of defendant's statements. Both sides appealed.

HELD: The Ninth Circuit Court of Appeals affirmed and reversed various rulings of the district court, but upheld the voluntariness of defendant's statements and the validity of his Hawaii *Miranda* waiver. Defendant claimed that the statements he made on the plane while traveling from Tokyo to Hawaii, and then those made when interrogated while in the Hawaii jail, were constitutionally inadmissible. He based these claims on allegations (among others) that he had been mistreated in Japan and that the officers had "coerced" him into talking. The alleged mistreatment while in custody in Japan involved the poor conditions in the Japanese prison and the lack of contact he'd been allowed with his family for the three months that he was there. The law on this issue is well-settled: An admission "is involuntary if coerced either by physical intimidation or psychological pressure." The issue is "whether a defendant's will was overborne by the circumstances surrounding the giving of a confession." In making this determination, a court must consider "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Also, it must be proved that there was some causal connection between the police conduct and the defendant's incriminating statements. Looking at the circumstances of this case, the Court noted that, contrary to his claims, his family had in fact visited him three or four times during his three months in the Japanese prison. Also, when picked up by the California officers, the evidence was that defendant "was alert and in good health; he was also jovial and extremely talkative." There was no evidence that he'd suffered any while in Japanese custody, but rather that he'd "weathered (his Japanese incarceration) quite well." Also, the evidence showed that on the flight between Japan and Hawaii, the officers did not threaten defendant physically or psychologically. In fact, they did not ask him any questions. They "merely reciprocated defendant's desire to engage in 'small talk' about traffic, philosophy, politics, and mutual acquaintances in California." There was no evidence here to support an argument that defendant's will was "overborne" by these circumstances. Defendant further argued that the mint given to him, which came from his wife's candy dish, was intended to "soften him up," leading to the incriminating statements he made while on the plane and his later agreement to waive his *Miranda* rights and talk about his crimes. The Court, however, found that the gift of a mint did not cause his will to be overborne. The initial incriminating statements weren't made until some four hours after he was given the mint. Given the fact that defendant acted the same before and after the mint incident, the Court found it hard to see how the mint was "causally related" to defendant's later statements. Also, giving a suspect candy "is a far cry from the type of police behavior typically associated with coercion." The Court also rejected defendant's claims that the flight "excessively fatigued" him, based upon the evidence. And even if he was tired, it takes more than that to make a defendant's statements involuntary. Defendant further argued that having invoked his right to counsel when first contacted in October, 1980, and remaining in continuous custody since then, the officers were precluded from reinitiating an attempt to question him by later seeking a *Miranda* waiver. "A suspect who invokes the right to counsel may not be interrogated unless he initiates the conversation." (*Edwards v. Arizona* (1981) 451 U.S. 477.) For purposes of this issue, the Court assumed that defendant telling Officer Nunez that he declined to talk without first consulting with an attorney was in fact an invocation. *Miranda* and *Edwards*, however, apply only to "interrogations," and not to casual conversations. An "interrogation" is defined as "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." On the airplane, the officers asked no questions and only responded to defendant's desire for small talk. They engaged in casual conversation of the type generally not subject to either *Miranda* or *Edwards*. On this issue, the Court rejected defendant's arguments that the officers purposely manipulated the conversation to lead to incriminating statements. Any movement towards making incriminating statements were initiated by defendant and not the officers. Further, defendant's statement to Detective Landry saying, "I would like to continue our conversation at a later time," was found to be an initiation of the interrogative process by defendant himself sufficient to overcome an *Edwards* argument. Defendant's unsolicited incriminating

statements made while on the airplane, and his later waiver of his rights, were voluntary. His statements were therefore properly admitted into evidence against him.

NOTE: Excellent handling of the situation by these officers. While doing nothing to push defendant into engaging in "casual conversation," they sat back quietly as defendant continued to dig a hole for himself. Given the lengthy period of time the officers were in defendant's presence while traveling, and his natural talkative nature ("He was so talkative that the federal marshal hoped he would stop talking"), he was just bound to stick his foot in his mouth at some point. Knowing this does not make it improper to let him go rambling on. And participating in the "small talk" with him is also okay, although doing things like giving him a mint from his wife's candy dish did make for some issues that could have been avoided. The officers did other stuff as well that gave defendant some fodder for appeal, such as bringing up the topic of defendant's brother who had committed suicide. But they were still a far cry from doing anything that could be considered as "softening up," or encouraging him to talk about his crimes. Lastly, the officers intelligently sought advice from their local prosecutor about whether to make a second attempt to get a *Miranda* waiver. A second, more detached, opinion is always a good idea.

NOTES: